Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1303

CARL D. BISHOP,

Petitioner,

v.

W. H. WOOD, CHIEF OF POLICE OF THE CITY OF MARION, NORTH CAROLINA; VICTOR DENTON, CITY MANAGER OF THE CITY OF MARION, NORTH CAROLINA; and THE CITY OF MARION, NORTH CAROLINA, A MUNICIPAL CORPORATION,

Respondents.

****

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

****

PETITION FOR WRIT OF CERTIORARI

****

Norman B. Smith
Smith, Carrington, Patterson,
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704 Southeastern Bldg.
Greensboro, N. C. 27401

Counsel for Petitioner

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ON WRIT OF CERTIORARI
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PETITION FOR WRIT OF CERTIORARI

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on January 31, 1975.

CITATIONS TO OPINIONS BELOW

The January 31, 1975, opinion of the United States Court of Appeals for the

Fourth Circuit is not published. This opinion was rendered after a rehearing en banc. The initial opinion of the United States Court of Appeals for the Fourth Circuit is published at 498 F.2d 1341 (1974). This action originated in the United States District Court for the Western District of North Carolina. The judgment of the United States District Court for the Western District of North Carolina is published at 377 F.Supp. 501 (1973). The two court of appeals decision and the district court decision are set out in the Appendix hereto, pp. 12-30.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 31, 1975. Jurisdiction of this court is invoked under 28 U.S.C. sec. 1254(1). Jurisdiction of the court of first instance in the United States District Court for the Western District of North Carolina, was founded upon 42 U.S.C. sec. 1983, 28 U.S.C. sec. 1343(3), and 28 U.S.C. sec. 1331(a).

QUESTIONS PRESENTED

1. Whether a regular full-time public employee, who has completed his probationary period and has become a permanent employee, can be discharged without notice and hearing.

2. Whether a publicly employed policeman can be dismissed without notice and hearing, when charged with not following orders, insubordination, causing low morale and committing conduct unsuited

to an officer.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner, a former police officer of the City of Marion, North Carolina, brought an action in the United States District Court for the Western District of North Carolina, Shelby Division, against respondents, W. H. Wood, Chief of Police, Victor Denton, City Manager, and the City of Marion, North Carolina, under 42 U.S.C. sec. 1983, contending that his rights under the Fourteenth Amendment were violated when he was discharged from his police job. He sought

an order requiring respondents to re-employ him and a monetary award of damages from date of discharge to date of judgment. (R. 2-6).

Cross-motions for summary judgment were filed. The district court granted respondents' motion for summary judgment and dismissed the action by order entered August 29, 1973. (Appendix hereto, pp. 12-24. The United States Court of Appeals for the Fourth Circuit in its initial decision of June 21, 1974, adopted per curian the judgment of the district court, over the dissent of Circuit Judge Winter. (Appendix hereto, pp. 25-29). A petition for rehearing en banc was granted by the Court of Appeals, and on January 31, 1975, an order was entered affirming the judgment of the district court "by an equally divided court." Appendix hereto, p. 30).

Petitioner was employed by the City of Marion, North Carolina, as a police officer on June 9, 1969. He was discharged from this employment on March 31, 1972. (R. 39). The reasons for petitioner's discharge were stated by respondent Chief of Police W. H. Wood to include insubordination, causing low morale, conduct unsuited to a police officer, refusal to cooperate with fellow officers, and violation of orders from supervisors. (R. 18-19). Each of these charges was specifically rebutted in affidavits offered by petitioner (R.22-26, 33-36), so that on summary judgment the court was not permitted to find that there was just cause for petitioner's discharge.

All policemen newly employed by the City of Marion serve a six-month probationary period, and afterward they are considered permanent employees. (R. 11, 14). The Personnel Ordinance of the City of Marion provides in pertinent part:

> A permanent employee whose work is not satisfactory over a period of time shall be notified in what way his work is deficient and what he must do if his work is to be satisfactory. If a permanent employee fails to perform work up to the standard of the classification held, or continues to be negligent, inefficient, or unfit to perform his duties, he may be dismissed by the City Manager. Any discharged employee shall be given a written notice of his discharge setting forth the effective date and reasons for his discharge if he shall request such a notice. (R. 4, 8).

By affidavits respondents contended that petitioner was corrected and criticized on various occasions, and thus implicitly warned of the possible loss of his job. (R. 17-18). However, these assertions are all vigorously denied by affidavits submitted on behalf of petitioner, including specific denials that his conduct was in any way questioned or criticized, and proof that petitioner was cooperative with fellow employees, obedient to his superiors, and that he conducted himself as a policeman in a thoroughly professional manner. (R. 22-37).

REASONS FOR GRANTING THE WRIT

I. A REGULAR FULL-TIME PUBLIC EMPLOYEE, WHO HAS COMPLETED HIS PROBATIONARY PERIOD AND HAS BECOME A PERMANENT EMPLOYEE, CANNOT BE DISCHARGED WITHOUT NOTICE AND HEARING.

In addition to job security rights under tenure laws, during the terms of employment contracts, and where the right to employment is grounded in statutes, this Court held in Board of Regents v. Roth, 408 U.S. 564, 567-78, n.16 (1972), and Perry v. Sindermann, 408 U.S. 593, 601-02 (1972), that public employees have a property interest in continued public employment, requiring notice and hearing before dismissal wherever:

(a) There is a clearly implied promise of continued employment;

(b) The employment practices in question have evolved into a "common law" of continued employment; or

(c) There is any other situation in which an employee has an objective expectation of continued employment (more than an abstract need, desire, or unilateral expectation of continued employment).

The procedures and ordinances of the City of Marion provide that newly hired policemen are probationary employees for

six months, at which time they become permanent employees. The ordinances provide that a permanent employee may be discharged only if he "fails to perform work up to the standard of the classification held, or continues to be negligent, inefficient, or unfit to perform his duties [after he has been first 'notified in what way his work is deficient and what he must do if his work is to be satisfactory']."

These provisions surely seem to amount to an implied promise of continued employment or to give rise to an objective expectation of continued employment, in fulfillment of the requirement of Board of Regents v. Roth and Perry v. Sindermann. If these "implied tenure" relationships, which are held to give rise to a pre-discharge notice and hearing, are to have any continued validity at all, they ought to be respected in the present case. The decision of the United State Court of Appeals for the Fourth Circuit in this respect appears to be a decision of a federal question in a way in conflict with applicable decisions of this Court. Supreme Court Rule 19(b).

A review of lower court decisions reveals a distressing lack of uniformity in dealing with due process rights of public employees who are subject to "implied tenure" arrangements. Compare Zimmerer v. Spencer, 485 F.2d 176 (5th Cir. 1973), where a public employee was held to have due process rights after being employed for six years, without a tenure system, but under a practice

of placing the employee on probation if contract non-renewal was contemplated; with Abeyta v. Town of Taos, 499 F.2d 323 (10th Cir. 1974) where the absence of either a contract or a fixed term of employment was held to preclude policemen's due process rights. [1]

It is important that the Court grant certiorari in this case, to reassert and clarify the pre-discharge notice and hearing requirements stemming from "implied tenure" public employment relationships. The conflicts between the decision of the United States Court of Appeals for the Fourth Circuit, and courts of appeals and district courts in the other circuits, on this subject ought to be resolved in the present case. Supreme Court Rule 19(b).

1. Compare also Puckett v. Mobile City Commission, 380 F.Supp. 593 (S.D.Ala. 1974) (Policemen without express tenure have procedural due process rights.) with Smetanka v. Borough of Ambridge, 378 F. Supp. 1366 (W.D.Pa. 1974) (Non-civil service police employees can be dismissed without notice and hearing.).

II. A PUBLICLY EMPLOYED POLICEMAN CANNOT BE DISMISSED WITHOUT NOTICE AND HEARING, WHEN CHARGED WITH NOT FOLLOWING ORDERS, INSUBORDINATION, CAUSING LOW MORALE AND COMMITTING CONDUCT UNSUITED TO AN OFFICER.

In Board of Regents v. Roth, 408 U.S. 564, 573 (1972), it was established that a public employee's right to liberty is violated, when he is discharged without notice and hearing, after having been accused of misconduct. The Court said, "The State, in declining to hire the respondent, did not make any charge against him that might seriously damage his standing and associations in the community. It does not base the non-renewal of his contract on a charge, for example, that he had been guilty of dishonesty, or immorality. Had it done so, this would be a different case. For '[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.'"

The record shows that in this case that respondents' alleged reasons for discharging petitioner were that he was insubordinate, caused low morale, engaged in conduct unsuited to a police officer, refused to cooperate with other officers, and violated orders of his supervisors. As Circuit Judge Winter correctly said in his dissenting opinion, "Accusations of this nature made against

one engaged in the occupation of a law enforcement officer manifestly have a severe adverse impact upon future employment opportunities, and it can be reasonably expected that defendants would disclose these reasons upon the request of a person considering plaintiff's employment who inquired of the respects in which plaintiff's work had been found unsatisfactory. To my mind, it therefore follows that procedural due process should apply, and as a minimum, plaintiff should have been given notice of and afforded an opportunity to refute the charges before he was dismissed" (Appendix hereto, p. 28).

Other lower court decisions appear consistently to support petitioner's position on this part of the case. Pre-discharge notice and hearing were held to be required on the basis of stigmatizing charges, for example, in Sims v. Fox, 492 F.2d 1088 (5th Cir. 1974)(unfitness and unsuitability), and Simmonds v. Government Employees' Service Commission, 375 F.Supp. 934 (D.C.V.I. 1974)(insubordinate and continuing to fail to comply with rules and regulations).

The court below, therefore, has decided a federal question in a way in conflict with applicable decisions in this Court, so that certiorari should be granted. Supreme Court Rule 19(b).

CONCLUSION

For the reasons set forth above, petitioner prays that the Petition for Certiorari be granted.

Respectfully submitted,

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* Prosecution of this proceeding is sponsored by the North Carolina Civil Liberties Union Legal Foundation, Inc.

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA

SHELBY DIVISION

CIVIL NO. SH-72-78

F I L E D
Asheville, N. C.
August 30, 1973
U.S. District Court
Western District of N.C.

CARL D. BISHOP Plaintiff v. W. H. WOOD, Chief of Police of the City of Marion, North Carolina, and others, Defendants	MEMORANDUM OF DECISION

The plaintiff, a former police officer of the City of Marion, North Carolina, brings this action against the defendants, W. H. Wood, Chief of Police, Victor Denton, City Manager, and the City of Marion, a municipal corporation, under 42 U.S.C.A., 1983 and 28 U.S.C.A., 1343(3), contending that his Fifth and Fourteenth Amendment rights were violated when he was discharged from his job. He seeks an order requiring the defendants to re-employ him and a monetary award of damages consisting of his wages from March 31, 1972, to the date of judgment.

Both parties have moved for summary judgment and filed affidavits and briefs. After full consideration of the pleadings, briefs, affidavits, and oral arguments, the Court now enters its findings and conclusions.

The parties agree that the plaintiff was employed by the City of Marion as a police officer on the 9th day of June, 1969, and was discharged from such employment on March 31, 1972, by the defendant, Victor Denton, City Manager, upon the recommendation of the defendant, W. H. Wood, Chief of Police. There was no written contract of employment, nor was there any agreement as to the terms of such employment. All newly employed policemen are on a probationary period for six months and afterwards are considered permanent employees. It is the practice and policy of the Police Department of the City to conduct a training program for new policemen and to require them to take training courses provided by the Community College and other institutions. The plaintiff was not given a formal hearing prior to dismissal, but was advised orally by the City Manager that he was to be dismissed upon the complaint of his superior, the Chief of Police.

The plaintiff contends that he was entitled to notice and a formal hearing before being discharged, and that the failure of the defendants to provide such notice and hearing violated his constitutional rights of due process as guaranteed by the Fifth and Fourteenth Amend-

ments. The facts as to why the plaintiff was discharged are in dispute. The Chief of Police and the City Manager contend that the plaintiff was discharged because of his failure to abide by the rules and regulations of the Police Department, particularly with regard to high speed automobile pursuits outside the city limits, his failure to check business establishments, and his failure to attend police training sessions. The plaintiff denies these allegations and offers evidence tending to show his compliance with the department's rules and regulations.

Article II, Section 6, of the Personnel Ordinance of the City of Marion, reads as follows:

> "Dismissal. A permanent employee whose work is not satisfactory over a period of time shall be notified in what way his work is deficient and what he must do if his work is to be satisfactory. If a permanent employee fails to perform work up to the standard of the classification held, or continues to be negligent, inefficient, or unfit to perform his duties, he may be dismissed by the City Manager. Any discharged employee shall be given written notice of his discharge setting forth the effective date and reasons for his discharge if he shall request such a notice."

The record discloses that the plaintiff was given oral notice of and reasons for his discharge, and, upon request, was given written notice and reasons for such discharge. There is no contention that the provisions of this Article were not complied with by the defendants.

The plaintiff contends that under the teachings of Perry v. Sindermann, 408 U.S., 593, 92 S.Ct. 2694, 33 L.Ed. 2d 579, he was entitled to continued employment and therefore entitled to constitutionally required notice and hearing before dismissal, and that since such rights were denied him he is entitled to judgment as a matter of law. On the other hand, defendants contend that the plaintiff was serving at the will and pleasure of the city, and that he had no property right in his continued employment as a policeman, and that notice and hearing prior to dismissal are not constitutionally required. On the basis of the admitted facts, it therefore appears the sole question for determination by this Court is whether the plaintiff was entitled to notice and hearing prior to his dismissal from the police force of the City of Marion. Therefore, summary judgment is now appropriate in this cause.

The plaintiff does not allege any violation of his First Amendment rights, but contends that he has acquired a property right in his employment which is protected by the Fourteenth Amendment.

He relies upon Perry v. Sindermann, supra, for his position that a public employee who has a legitimate claim to continued employment is entitled to a notice and hearing consistent with procedural due process standards before his employment constitutionally can be terminated. He contends that after the six months probationary period he became a permanent employee, and that several police officers have been employed by the city on a continued basis for many years, and that he therefore acquired tenure or at least acquired the right to expect continued employment.

The defendants contend that the plaintiff was serving at the will of the city, and that he had acquired no property right in such employment which would be protected by the Fifth or Fourteenth Amendments. They contend that the plaintiff was subject to dismissal without notice and hearing so long as it was not in retribution for an exercise of some constitutionally protected right.

The plaintiff's reliance upon Perry v. Sindermann, supra, is misplaced, as that case is clearly distinguishable from the case at bar. First, Sindermann alleged that his discharge was based upon his testimony before the Texas legislature and his public disagreements with the policies of the Board of Regents of the College. He thus contended that he was discharged for the exercise of his First

Amendment rights. No such allegation or contention appears in the case at bar. Second, the Supreme Court struck down the Circuit Court's holding that a mere subjective expectancy of continued employment is protected by procedural due process, and held that the plaintiff, a professor with 10 years of service, should not be foreclosed from proving his entitlement to tenure based upon the rules and understandings officially promulgated and fostered. On the same day, the Supreme Court decided Board of Regents of State Colleges v. Roth, 408 U.S., 564, 92 S.Ct. 2701, 33 L.Ed. 2d 548, and held that a professor, with one year of service, was not denied his constitutional rights of liberty and property without due process when the university failed to give him a statement of reasons and provide a hearing on its decision not to re-hire him for another year. The Court said:

> "It stretches the concept too far to suggest that a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another. Cafeteria Workers v. McElroy, supra, 367, U.S. at 895-896, 81 S.Ct. at 1748-1749, 6 L.Ed. 2d 1230."

Here, as in Roth, there is no suggestion whatever that the plaintiff's loss of his "good name, reputation, honor or integrity" is at stake. There is nothing involved except one job with the city, and the plaintiff remains free to seek another job. The court said in

Roth, with reference to property interests:

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
>
> "Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." 92 S.Ct. 2709.

Under the law in North Carolina, nothing else appearing, a contract of employment which contains no provision for the duration or termination of employment is terminable at the will of either party irrespective of the quality of performance by the other party. By

statute, G.S. 115-142(b), a County Board of Education in North Carolina may terminate the employment of a teacher at the end of the school year without filing charges or giving its reasons for such termination, or granting the teacher an opportunity to be heard. Still v. Lance, 279 N.C., 254, 182 S.E. 2d 403 (1971).

It is clear from Article II, Section 6, of the City's Personnel Ordinance, that the dismissal of an employee does not require a notice or hearing. Upon request of the discharged employee, he shall be given written notice of his discharge setting forth the effective date and the reasons for the discharge. It thus appears that both the city ordinance and the state law have been complied with.

It further appears that the plaintiff held his position at the will and pleasure of the city.

In Hodgin v. Noland, 435 F. 2d 859 (4th Cir. 1970), the plaintiff, a city librarian, was discharged without notice and hearing. The court held:

> "We conclude that the trial judge was correct in instructing that the defendants were not required to give such a formal notice or to provide a hearing. As city librarian, Mr. Hodgin held his position at the will and pleasure of the city. There was no contractual or other

> arrangement limiting the right of termination. Accordingly, he was subject to summary discharge with or without cause, so long as it was not in retribution for an exercise by him of some constitutionally protected right." (Citations omitted.)

In Brown v. Hirst, 443 F. 2d 899 (4th Cir. 1971), the court followed Hodgin and affirmed the district court in dismissing the complaint of a city employee who alleged he had been fired without a hearing in violation of due process. The court said:

> "Appellant worked for the City of Roanoke, and the city charter gives appellee, as the city manager, the 'power to discipline and remove' any city employee. Thus, as in Hodgin, the appellant in the instant case was employed at the will and pleasure of the city and thus was subejct to dismissal so long as it was not in retribution for an exercise of some constitutionally protected right."

The Fourth Circuit has spoken on this question since the Supreme Court decisions in Sindermann and Roth. In

Chitwood v. Feaster, 468 F. 2d 359 (4th Cir. 1972), non-tenured teachers not rehired by a state college in West Virginia contended they were entitled to a statement of reasons for failure to renew their contract and that they should have been given notice and a hearing before the decision not to renew became final. Chief Judge Haynsworth, speaking for the court, said:

> "The first contention has been foreclosed by a subsequent decision of the Supreme Court in Board of Regents of State Colleges v. Roth, 408 U.S., 564 92 S.Ct. 2701, 33 L.Ed. 2d 548. These teachers were not tenured and there was no basis for any reasonable expectancy of permanent employment. While the college might have dealt with them more frankly, under Roth, they had no constitutional right to a statement of reasons for the failure to renew their contracts or to an opportunity for an administrative hearing."

In Johnson v. Fraley, 470 F. 2d 179 (4th Cir. 1972), the court held that a public school teacher who had been so employed on a continuous basis for 29 years, and who was dismissed without notice and hearing allegedly contrary to the Board's own regulation and State law was entitled to be heard on implied tenure. The court, in Kota v. Little, 473 F. 2d 1 (4th Cir. 1973), followed Roth and Chitwood relative to the re-

employment of an untenured professor.

The plaintiff's dismissal was not for impermissible constitutional reasons such as race or religion, or for retribution for the exercise of other First Amendment rights, and such dismissal did not result in deprivation of his liberty in any form, nor did it interfere with a property right. He had no tenure, and the city had not created by regulation or policy, any condition in which its employees could expect continued employment. Since his dismissal resulted in no deprivation of an interest or right protected by the Fifth or Fourteenth Amendments, he was not entitled to a formal hearing prior to said dismissal. The defendants are therefore entitled to a dismissal of the action, and their Motion for Summary Judgment will be allowed. An order dismissing the action will be entered simultaneously herewith.

This the 29th day of August, 1973.

/s/ Woodrow W. Jones
Chief Judge,
United States District Court

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

SHELBY DIVISION

CIVIL NO. SH-72-78

CARL D. BISHOP, Plaintiff, v. W. H. WOOD, Chief of Police of the City of Marion, North Carolina, and others, Defendants.	F I L E D Asheville, N.C. August 30, 1973 U.S. District Court Western District of N.C. O R D E R

THIS MATTER is before the Court upon Motions for Summary Judgment filed by the plaintiff and the defendants; and

It appearing to the Court that the defendants' Motion should be allowed for the reasons set forth in the Memorandum of Decision filed simultaneously herewith,

IT IS, THEREFORE, ORDERED that the defendants' Motion for Summary Judgment, be, and the same is hereby allowed, and plaintiff's action is hereby dismissed.

This the 29th day of August, 1973.

/s/ Woodrow W. Jones
Chief Judge,
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 73-2240

CARL D. BISHOP, Plaintiff v. W. H. WOOD, Chief of Police of the City of Marion, North Carolina, and others, Defendants	DECISION

Appeal from the United States District Court for the Western District of North Carolina; Woodrow Wilson Jones, Chief Judge.

J. David James, Greensboro, N. C. (Norman B. Smith, Smith, Carrington, Patterson, Follin & Curtis, Greensboro, N. C., on brief), for plaintiff-appellant.

Charles E. Burgin, Marion, N. C. (Dameron & Burgin, Marion, N. C., on brief), for defendants-appellees.

Before Bryan, Senior Circuit Judge, and Winter and Widener, Circuit Judges.

PER CURIAM:

Upon consideration of the record, the briefs, and oral argument, we are of opinion the judgment below was correct,

and affirm on the opinion of the district court, 377 F.Supp. 501 (W.D.N.C. 1973).

Affirmed.

Winter, Circuit Judge (dissenting):

Unlike my co-panelists, I think that Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701,33 L.Ed.2d 548 (1972), and Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694, 33 L.Ed.2d 570 (1952), not only foreclosed the entry of summary judgment for defendants, but require that, if summary disposition is to be made, plaintiff should be adjudged entitled to recover damages from defendants in an amount subsequently to be assessed. I therefore respectfully dissent.

Plaintiff was employed as a policeman for more than thirty-three months by the City of Marion, North Carolina. He was dismissed by the City Manager upon the complaint of the Chief of Police for unsatisfactory work, failure to attend training school, "insubordination," and the commission of "acts unsuited to a police officer." Admittedly, the plaintiff was not given notice that there were grounds allegedly sufficient to discharge him, nor was he given a hearing to determine if those grounds were well grounded. He was given written notice of his discharge, but all of the reasons therefor were not set forth. In short, if plaintiff was entitled to be afforded procedural due process, it was clearly denied him; he was given neither notice nor a hearing.

As I read Roth and Sindermann, plaintiff was entitled to recovery under either or both of two theories. In my view, he had been deprived of an interest in "property" and he had been deprived of his "liberty."

Roth and Sindermann make clear that the right to tenure is a "property" interest entitled to the protection of procedural due process. Plaintiff possessed such a right. Under the ordinances of the City of Marion which governed his employment, newly hired policemen are probationary employees for six months. After then they become permanent employees, and a permanent employee may be discharged only if he "fails to perform work up to the standard of the classification held, or continues to be negligent, inefficient, or unfit to perform his duties [after he has been first 'notified in what way his work is deficient and what he must do if his work is to be satisfactory']." Article II, § 6, Personnel Ordinance of the City of Marion. I can only read this ordinance as giving plaintiff a right to continuing employment unless there be good cause for his dismissal. This continuing right is tantamount to tenure; hence, my conclusion that plaintiff had a "property" right to his employment entitling him to procedural due process protection.

Even if plaintiff lacked a property right in his job, there can be no question that the circumstances of his dismissal from public employment injured

certain interests embraced within the concept of "liberty" found in the fourteenth amendment. In Roth, the Court quoted from Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S.Ct. 507, 510, 27 L.Ed.2d 515 (1971), that "[w]here a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." 408 U.S. at 573, 92 S.Ct. at 2707. Defendants' affidavits admit that plaintiff was dismissed, inter alia, because of "insubordination" and "conduct unsuited to a police officer." Accusations of this nature made against one engaged in the occupation of a law enforcement officer manifestly have a severe adverse impact upon future employment opportunities, and it can be reasonably expected that defendants would disclose these reasons upon the request of a person considering plaintiff's employment who inquired of the respects in which plaintiff's work had been found unsatisfactory. To my mind, it therefore follows that procedural due process should apply, and as a minimum plaintiff should have been given notice of and afforded an opportunity to refute the charges before he was dismissed.

I add a word about the jurisdiction of the district court. Plaintiff joined the City of Marion, North Carolina, as a party-defendant, together with the Chief of Police and the City Manager. Jurisdiction was alleged to exist under 42 U.S.C. § 1983; 28 U.S.C. §§ 1331(a) and 1343(3). Of course, Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492

(1961), and City of Kenosha v. Bruno, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109 (1973), hold that the City of Marion is not a "person" within the meaning of 42 U.S.C. § 1983, and therefore the district court lacked jurisdiction over the claim against the City under 28 U.S.C. § 1343(3). Jurisdiction as to the individual defendants unquestionably existed. But, as to the City, plaintiff alleged a deprivation of his right to procedural due process under the fourteenth amendment, and the district court had jurisdiction under 28 U.S.C. §1331(a), provided there was the requisite amount in controversy. Whether $10,000 is at issue is sharply contested on the theory that plaintiff's back pay claim after mitigation of damages will not reasonably amount to $10,000. The short answer is that the district court had pendent jurisdiction over the claim against the City arising directly under the fourteenth amendment by reason of the intimate connection of that claim with the § 1983 claim against the other defendants. The Second Circuit has held that the doctrine of pendent jurisdiction applies even where the defendant to the pendent claim is not a defendant to the claim conferring jurisdiction, and I would follow its lead. Leather's Best, Inc. v. S.S. Mormaclynx, 451 F.2d 800, 809-811 (2Cir. 1971).

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 73-2240

F I L E D
January 31, 1975
William K. Slate, II
Clerk

CARL D. BISHOP, Appellant,

v.

W. H. WOOD, Chief of Police
of the City of Marion, North Carolina;
VICTOR DENTON, City Manager of the
City of Marion, North Carolina;
and the City of Marion, North Carolina,
a municipal corporation,

Appellees

ORDER

The judgment of the district court is affirmed by an equally divided court.

For the Court:

/s/ Harrison L. Winter
United States
Circuit Judge

Supreme Court, U. S.
FILED
DEC 4 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 74-1303

CARL D. BISHOP,

Petitioner,

-v.-

W. H. WOOD, CHIEF OF POLICE OF THE CITY OF MARION, NORTH CAROLINA; VICTOR DENTON, CITY MANAGER OF THE CITY OF MARION, NORTH CAROLINA; and THE CITY OF MARION, NORTH CAROLINA, A MUNICIPAL CORPORATION,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 16, 1975

CERTIORARI GRANTED OCTOBER 14, 1975

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I N D E X - RECORD ON APPEAL

Carl D. Bishop, Appellant,

versus Civil No. SH-72-78

W. H. Wood, Chief of Police,
City of Marion, N.C.,et al, Appellees

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION

CARL D. BISHOP,	)	
	)	
Plaintiff,	)	
	)	
v.	)	COMPLAINT
	)	
W. H. WOOD, Chief of Police of the City of Marion, North Carolina; VICTOR DENTON, City Manager of the City of Marion, North Carolina; THE CITY OF MARION, NORTH CAROLINA, A Municipal Corporation,	)	
	)	
Defendants.	)	

Plaintiff, complaining of defendants, alleges and says:

1. Plaintiff is a citizen and resident of Nebo, McDowell County, North Carolina, and is a citizen of the United States.

2. Defendant W. H. Wood is a citizen and resident of Marion, McDowell County, North Carolina, and is the duly

appointed, qualified, and acting Chief of Police of the City of Marion, North Carolina. Defendant Victor Denton is a citizen and resident of Marion, McDowell County, North Carolina, and is the duly appointed, qualified, and acting City Manager of the City of Marion, North Carolina. Defendant City of Marion, North Carolina, is a municipal corporation located in McDowell County, North Carolina, chartered and operating under the laws of the State of North Carolina.

3. Jurisdiction of this action is founded upon 42 U.S.C. 1983, 28 U.S.C. 1343(3), and 28 U.S.C. 1331(a). The amount in controversy exceeds $10,000.00, exclusive of interest and costs.

4. In 1969 plaintiff was employed as a policeman in the police department of the City of Marion, North Carolina. Plain-

tiff acted in this capacity until March 31, 1972. In all respects plaintiff carried out the orders of his superiors, abided by departmental and municipal rules and regulations, conducted himself in accordance with the laws of the State of North Carolina, and handled the duties of his job as a policeman in a thoroughly professional, competent manner.

5. On March 31, 1972, defendant W. H. Wood, Chief of Police of the City of Marion, North Carolina, dismissed plaintiff from his employment. No previous notification of deficiency, reprimand or other warning had been given to plaintiff concerning his conduct or performance of duties. Defendant Victor Denton, City Manager of the City of Marion, North Carolina, approved the dismissal.

6. Defendant W. H. Wood notified

plaintiff in writing, at the plaintiff's request, following his discharge that the dismissal was because of unsatisfactory work and failure to attend the training schools. There is no basis in fact to support either of these reasons. Plaintiff is informed and believes, and so alleges, that the true reason for his dismissal is that plaintiff diligently carried out his duties by making arrests for misdemeanors whenever he found probable cause that the misdemeanors were being committed in his presence, and that he treated the citizens of his community equally without regard to their political or social status.

7. Article II, Section 6 of the Personnel Ordinance of the City of Marion, North Carolina, adopted April 7, 1970, provides:

A permanent employee whose work is not satisfactory over a period of time shall be notified in what way his work is deficient and what he must do if his work is to be satisfactory. If a permanent employee fails to perform work up to the standard of the classification held, or continues to be negligent, inefficient, or unfit to perform his duties, he may be dismissed by the City Manager. Any discharged employee shall be given a written notice of his discharge setting forth the effective date and reasons for his discharge if he shall request such a notice.

8. Plaintiff was not given any advance notice that defendants believed they had grounds to discharge him, and plaintiff was not given a hearing by defendants to determine whether or not there existed sufficient grounds for plaintiff's dismissal as a public employee.

9. At all times material hereto defendants were acting under color of sta-

tute, ordinance, regulation, custom and usage of the State of North Carolina.

10. Defendants' acts herein complained of subjected plaintiff to the deprivation of rights, privileges, and immunities secured by the Constitution and laws of the United States, and particularly the right to have notice and hearing in advance of the termination of public employment as required by the Fifth and Fourteenth Amendments to the Constitution of the United States.

11. Plaintiff does not have an adequate remedy at law for the enforcement of the rights asserted in this action. Defendants' conduct has caused irreparable damage and injury to plaintiff.

WHEREFORE, plaintiff prays that the Court:

(a) Enter an injunction, enjoining and restraining defendants to re-employ plaintiff as a policeman of the City of Marion, and to refrain from discharging him or discriminating against him in any way in violation of his rights under the Constitution and laws of the United States.

(b) Award plaintiff damages against defendants consisting of the pay he would have received from March 31, 1972, to the date of judgment.

(c) Tax the costs of this action against defendants.

(d) Grant plaintiff such other and further relief as to the Court may seem

just and proper.

/s/ Norman B. Smith

Attorney for Plaintiff
Norman B. Smith
Smith, Patterson, Follin
& Curtis
816 Southeastern Building
Greensboro, North Carolina
27401
Telephone: 919-275-8603

NORTH CAROLINA

McDOWELL COUNTY

Carl D. Bishop, being first duly sworn, deposes and says that he is the plaintiff in the above-entitled action, that he has read the foregoing complaint and knows the contents thereof, and that said contents are true of his own knowledge, save and except for those matters and things stated therein upon information and belief, and as to such matters and things, he believes said contents to be true.

/s/ Carl D. Bishop
Affiant

Sworn to and subscribed
before me this _____ day of
_____, 1972.

_____ [Duly notarized]
Notary Public

My commission expires:

_____

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION

CARL D. BISHOP, Plaintiff, v. W. H. WOOD, Chief of Police of the City of Marion, North Carolina; VICTOR DENTON, City Manager of the City of Marion, North Carolina; and THE CITY OF MARION, NORTH CAROLINA, A Municipal Corporation, Defendants.	ANSWER AND DEMAND FOR TRIAL BY JURY

FIRST DEFENSE

The Complaint fails to state a claim upon which relief can be granted against any of the defendants named and all defendants, therefore, move that the Complaint be dismissed.

SECOND DEFENSE

The defendants, and each of them, answering the allegations of the Complaint, allege and say:

1. The allegations of Paragraphs 1 and 2 of the Complaint are admitted.

2. Answering the allegations of Paragraph 3 of the Complaint, the defendants deny that the amount in controversy exceeds Ten Thousand ($10,000.00) Dollars, exclusive of interest and costs. All other allegations of Paragraph 3 are admitted.

3. Answering the allegations of Paragraph 4 of the Complaint, the defendants admit that plaintiff was employed as a policeman in the Police Department of the City of Marion, North Carolina in 1969 and that plaintiff acted in such capacity until March 31, 1972. All other

allegations of Paragraph 4 are denied.

4. Answering the allegations contained in Paragraph 5 of the Complaint, the defendants admit that the plaintiff was dismissed from his employment on March 31, 1972 by W. H. Wood, Chief of Police of the City of Marion, North Carolina, and that such dismissal was approved by the City Manager, Victor Denton. All other allegations of Paragraph 5 are denied.

5. Answering the allegations contained in Paragraph 6 of the Complaint, the defendants admit that the plaintiff, at his request, and following his discharge, was notified in writing by defendant W. H. Wood that his dismissal was due to unsatisfactory work and failure to attend training schools. All other allegations of Paragraph 6 are denied.

6. The allegations contained in Paragraph 7 of the Complaint are admitted.

7. Answering the allegations of Paragraph 8 of the Complaint, the defendants admit that plaintiff was not given a formal hearing by defendants prior to his dismissal since he did not request such a hearing and since he had been advised on several occasions that he would be dismissed if he persisted in his refusal to attend training school as was required of all officers of the Marion City Police Department.

8. The allegations contained in Paragraph 9 of the Complaint are denied.

9. The allegations contained in Paragraph 10 of the Complaint are denied.

10. The allegations contained in Paragraph 11 of the Complaint are denied.

WHEREFORE, the defendants respectfully request that the Court:

a. Dismiss the Complaint as to each and every one of the defendants named therein;

b. That the costs of this action be taxed against the plaintiff;

c. That the Court grant the defendants and each of them a trial by jury of all issues; and

d. That the Court grant the defendants such other and further relief as the Court may deem just and proper.

/s/ Charles E. Burgin
Attorney for Defendants
Charles E. Burgin
Dameron & Burgin
14 West Court Street
Marion, North Carolina
28752
Telephone: 704-652-2441

[Jurat Omitted]

[Certificate of Service Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION
Civil No. SH-72-78

CARL D. BISHOP, Plaintiff, v. W. H. WOOD, etc., et al., Defendants.	PLAINTIFF'S INTERROGATORIES TO DEFENDANTS

The defendants are hereby requested to answer under oath the following interrogatories within 30 days from the date of service hereof, pursuant to Rule 33 of the Federal Rules of Civil Procedure:

1. How many officers and uniformed patrolmen are employed by the Police Department of the City of Marion, North Carolina?

2. Give the length of time that each other officer and uniformed patrolman has been employed.

3. Does the Police Department of the City of Marion conduct training programs for newly hired policemen?

4. If the answer to the preceding interrogatory is in the affirmative, how long does the training program last and what are the duties of policemen while enrolled in the training program?

5. Does the Police Department of the City of Marion, North Carolina, have a probationary period for newly hired policemen?

6. If the answer to the preceding interrogatory is in the affirmative, how long does this probationary period last?

7. Does the Police Department of the City of Marion, North Carolina, have written contracts of employment with any officer or uniformed patrolman?

8. If the answer to the preceding interrogatory is in the affirmative, what are the terms of these employment contracts?

9. Have any uniformed patrolmen or officers been discharged by the Police Department of the City of Marion, North Carolina, since January 1, 1969? If so, how many?

10. If the answer to the preceding interrogatory is in the affirmative, for each officer or uniformed patrolman discharged, state (1) whether or not a hearing was held prior to the discharge, (2) whether or not the discharged employee was given prior warning that he

would be discharged, (3) whether or not the discharged employee was given notice in writing of the reasons for his discharge, (4) and the purported reason for the discharge.

Respectfully submitted,

/s/ Norman B. Smith
Attorney for Plaintiff
Norman B. Smith
Smith, Patterson, Follin
& Curtis
816 Southeastern Building
Greensboro, North Carolina
27401
Telephone: 919-275-8603

[Certificate of Service Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION
Civil No. SH-72-78

CARL D. BISHOP, Plaintiff, v. W. H. WOOD, Chief of Police of the City of Marion, North Carolina; VICTOR DENTON, City Manager of the City of Marion, North Carolina; and THE CITY OF MARION, NORTH CAROLINA, A Municipal Corporation, Defendants.	DEFENDANTS' ANSWERS TO PLAINTIFF'S INTERROGATORIES

TO: Norman B. Smith
Attorney for Plaintiff
816 Southeastern Building
Greensboro, North Carolina 27401

The following are the answers of the defendants to the interrogatories numbered 1 through 10, direct to the defendants, to be answered pursuant to Rule 33:

ANSWER TO INTERROGATORY NUMBER 1:

Seventeen

ANSWER TO INTERROGATORY NUMBER 2:

William H. Wood ---- Since July 1, 1946
John W. Beck ------- Since November 30, 1950
Henry H. Trent ----- Since June 15, 1964
Eugene R. Dixon ---- Since January 1, 1966
Jack D. Causby ----- Since July 15, 1966
Paul G. Elliott ---- Since March 27, 1967
Silas S. Blankenship Since June 1, 1967
Charles W. Queen --- Since October 1, 1967
Tommy M. Bryant ---- Since August 1, 1969
Mildred L. Jarrett - Since August 27, 1954
Alfred A. Dillingham Since July 1, 1967
Alvin R. Hawkins --- Since July 1, 1967
Frank E. Williams -- Since September 18, 1971
Kenneth W. Ledbetter Since April 10, 1972
Dennis Barrier ----- Since April 24, 1972
Golden N. Arrowood - Since August 11, 1972

Earl Webb ---------- Since November 6, 1972

ANSWER TO INTERROGATORY NUMBER 3:

Yes.

ANSWER TO INTERROGATORY NUMBER 4:

Marion Police Department requires the officers to attend all training schools the department can send them to. The Department holds a three-hour class once a month on Basic Law Enforcement at the Marion Police Department. New Policemen work with trained officers for a while when they first go to work.

ANSWER TO INTERROGATORY NUMBER 5:

Yes.

ANSWER TO INTERROGATORY NUMBER 6:

Six Months.

ANSWER TO INTERROGATORY NUMBER 7:

No.

ANSWER TO INTERROGATORY NUMBER 8:

Not applicable.

ANSWER TO INTERROGATORY NUMBER 9:

Yes. One officer.

ANSWER TO INTERROGATORY NUMBER 10:

(1) The officer was not given a formal hearing prior to his dismissal, but was, on several occasions prior to dismissal, given informal hearings. (2) Yes, the discharged employee was advised on several occasions prior to dismissal that he would be dismissed if he persisted in his refusal to comply with the rules of the Police Department. (3) Yes, the discharged employee after dismissal, and at his request, was notified in writing of the reasons for his discharge. (4) The reason for the employee's discharge is as set forth in the letter to the em-

ployee, which letter is in the possession of the employee.

[Jurat Omitted]

[Certificate of Service Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION
Civil No. SH-72-78

CARL D. BISHOP,	]	
	]	
Plaintiff,	]	
	]	
v.	]	MOTION FOR SUMMARY JUDGMENT
	]	
W. H. WOOD, Chief of Police of the City of Marion, North Carolina; VICTOR DENTON, City Manager of the City of Marion, North Carolina; and THE CITY OF MARION, NORTH CAROLINA, A Municipal Corporation,	]	
	]	
Defendants.	]	

TO: Norman B. Smith
Attorney for Plaintiff
816 Southeastern Building
Greensboro, North Carolina 27401

The defendants, W. H. WOOD, VICTOR DENTON and THE CITY OF MARION, by CHARLES E. BURGIN, their attorney, hereby move the court to enter summary judgment for the defendants and each of them, in

accordance with the provisions of Rule 56(b) and (c) of the Rules of Civil Procedure, on the ground that the pleadings and interrogatories on file, and the affidavits hereto attached, marked Exhibits A, B, C, show that the defendants are entitled to judgment as a matter of law.

This 18th day of May, 1973.

/s/ Charles E. Burgin
Charles E. Burgin
Attorney for Defendants
14 W. Court Street
Marion, North Carolina
28752
Tele. (704) 652-2441

STATE OF NORTH CAROLINA
COUNTY OF McDOWELL

AFFIDAVIT

Victor H. Denton, first being duly sworn, deposes and says under oath:

(a) That he was City Manager of the City of Marion, North Carolina, from October 1, 1968 to November 30, 1972, and with regard to the release of Officer Dean Bishop from employment as a policeman with the City of Marion, the affiant further says:

"Chief Wood informed me several days before Dean Bishop was released that he had been having some personnel problems with Bishop for several months and that he had conferred with Bishop on one or two occasions about his attitude.

Chief Wood stated that the problems related to a poor attitude and failure to carry out orders, Chief Wood informed me

that he had discussed this matter with Bishop on one or more occasions. I informed Chief Wood that before taking any disciplinary action, he should discuss the problem areas with Bishop and make him aware of the consequences if he failed to bring his level of performance up to an acceptable manner. Later Chief Wood informed me that he would comply with this request.

A week or two after this Chief Wood informed me that Bishop was continuing to act independently of his requests and he had decided to release him. I told the the Chief in light of all he told me that I concurred with his recommendation. I accepted the Chief's invitation to talk with Bishop in front of the Chief. I informed Bishop of the Chief's decision and the fact that I concurred with his deci-

sion. Bishop stated that we were doing him a favor in releasing him, he then excused himself and left."

/s/ Victor H. Denton

[Jurat Omitted]

(Certificate of Service Omitted]

STATE OF NORTH CAROLINA

COUNTY OF McDOWELL A F F I D A V I T

BILL WOOD, first being duly sworn, deposes and says under oath:

That he is Chief of Police of the City of Marion and was acting in such capacity at the time Officer Carl D. Bishop was discharged as a city policeman.

In reference to Officer Bishop's being relieved of his duties, I had him in my office on several occasions during a six month period prior to his discharge, concerning high speed automobile chases outside the city limits, checking business establishments in the city and answering routine patrol calls.

Officer Bishop did not attend training sessions conducted by the police department and did not make plans to be ex-

cused from such sessions. Officer Bishop refused to cooperate with fellow officers and did not take orders from the officer in charge of his duty shift. Officer Bishop was the cause of low morale on the third duty shift and a verbal complaint was filed against him by Sergeant Arrowood concerning Bishop's acts of conduct which were unsuited to a police officer.

Officer Bishop told me that he had other jobs to do and to work at and that these other jobs were necessary for him to make a living for his family. When Officer Bishop was relieved of his duties, he told me that this was the best thing that had ever happened to him and that Mr. Denton, the City Manager, had done him a favor by letting him go.

Officer Bishop was relieved of his duties because of of insubordination, fail-

ure to attend training classes, and acts unsuited to a police officer. The number or nature of arrests made by Officer Bishop was not a factor in his dismissal.

/s/ Bill Wood

[Jurat Omitted]

[Certificate of Service Omitted]

STATE OF NORTH CAROLINA

COUNTY OF McDOWELL A F F I D A V I T

CAPTAIN JOHN W. BECK, first being duly sworn, deposes and says under oath:

Police Officer Carl Dean Bishop attended only one training class that I can remember that we had at City Hall. He attended only one at McDowell Technical Institute and none elsewhere.

When asked why he did not attend these training sessions, Bishop stated that he had work to do at home. Generally, Officer Bishop's attitude was to the effect that he thought he was the only man who did anything.

/s/ Captain John W. Beck

[Jurat Omitted]

[Certificate of Service Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION
Civil No. SH-72-78

CARL D. BISHOP, Plaintiff,	)	
v.	)	PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
W. H. WOOD, etc., et al., Defendants.	)	

NOW COMES plaintiff in the above-entitled action and respectfully moves the Court for an order granting plaintiff summary judgment, as provided in Rule 56 of the Rules of Civil Procedure, on the ground that it appears from the record without dispute of material facts that plaintiff had a permanent position of employment with the City of Marion Police Department, and this employment was terminated by defendants involuntarily without a notice and hearing in advance, and

without the existence of undisputed acts of misconduct that would justify dismissal.

Respectfully submitted,

/s/ Norman B. Smith
Attorney for Plaintiff
Norman B. Smith
Smith, Patterson, Follin
& Curtis
816 Southeastern Building
Greensboro, North Carolina
27401
Telephone: 919-275-8603

[Certificate of Service Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION
Civil No. SH-72-78

CARL D. BISHOP, Plaintiff, v. W. H. WOOD, etc., et al., Defendants.	AFFIDAVIT OF PLAINTIFF

Carl D. Bishop, being first duly sworn, deposes and says:

1. My name is Carl D. Bishop, and I am the plaintiff in this action.

2. I have read the affidavits of Victor Denton, Bill Wood, and Captain John W. Beck, filed by defendants in this action in support of their motion for summary judgment. Much of the material contained in these affidavits is false. The purpose of this affidavit is to state

the true facts with respect to transactions and occurrences which are the subjects of the affidavits filed by defendants.

3. In Victor H. Denton's affidavit it is stated that I told Mr. Denton and Chief Wood that they were doing me a favor in releasing me from service as a policeman. This is not true. On the occasion in question I had heard that I was being dismissed. I asked for an interview with Mr. Denton to find out if this was true. Mr. Denton granted me an interview. In response to my inquiry, he told me that I was in fact being dismissed. I protested to Mr. Denton, saying, "I cannot understand why my work is unsatisfactory. I try to put all I have in my job. If every officer had put as much effort into the court system

as I have and had put as much money from fines into the local school as I have, the city would get back more money than the officers receive in pay." At this point Mr. Denton appeared angry and started to get up out of his chair. He said, "If you pursue this matter any more, it will get worse." Mr. Denton then invited me to be excused, and in obedience to the invitation I left. I had a discussion with Chief Wood outside Mr. Denton's office at this point, and I asked the chief if I could talk with Mr. Denton again. I went into Mr. Denton's office a second time, and again Mr. Denton asked me to be excused. Again, I left the office when he told me to do so. At no point did I tell Mr. Denton or Chief Wood that they were doing me a favor by dis-

McDowell Technical Institute and satisfactorily completed there a school on small arms, as part of my duties in the police department. Records of McDowell Technical Institute showing that I completed both of these courses are attached hereto and made a part hereof. I was scheduled to attend a radio technician's training course at McDowell Technical Institute. I was able to attend only one out of four of the sessions. When one of the sessions was scheduled, I was on my way to the Technical Institute when I was requested by a State Bureau of Investigation agent, Benjamin F. Wade, and State Highway Patrolman Robert C. Jones, to take part in a drug raid. Affidavits executed by Messrs. Wade and Jones establishing that I assisted them on this occasion are

attached hereto. When another one of the radio technician's training sessions was scheduled, I was extremely ill with intestinal flu at home. I was so sick that I was in the bathroom vomiting constantly the entire evening. I do not think that I could have made it to the telephone to call the police department and say that I would not be present at the course, had I thought to do so, but my mind was on my condition, and it did not occur to me to try to get in touch with the police department. When another one of the radio technician's training sessions was scheduled, I was taking a week's vacation. I was planning to attend the session and would have attended it, even though it was during my vacation, but I received word that the session was postponed. When I learned of the date to which this par-

ticular session had been postponed, it was in conflict with plans I had already made to go to Boone, North Carolina, to fill out my income tax returns, which were to have been due soon after that. I sent word to the chief of police by a fellow officer of this conflict, and the chief was informed that I would not be able to attend that particular session. I explained the reason for my absence to my superior at the police department the following day. To the best of my knowledge, I attended all other training sessions required of the Marion Police Department for its officers while I was employed by that department.

6. In Bill Wood's affidavit it is stated that I refused to cooperate with fellow officers and did not take orders from the officer in charge of my duty

shift. There is no basis for these statements. There is no occasion that I know of on which I did not cooperate fully with fellow officers in all work of the department. There is no occasion that I know of when I did not accept and carry out orders given by my supervisors in the department. It is also said in Bill Wood's affidavit that I was the cause of low morale on the third duty shift. This statement is not correct. I do not believe there was low morale on this shift, and if there was, there is no basis whatever for saying that I was the cause of it.

7. In Bill Wood's affidavit it is stated that Sergeant Arrowood filed a verbal complaint against me alleging conduct unsuited to a police officer. If Sergeant Arrowood ever did file such a verbal complaint, I never received any know-

ledge or notice of it. Sergeant Arrowood never criticized me in any way during the two years and ten months that I worked under him. All of his comments about my work and conduct were favorable. I know of no action on my part that ever could have been regarded as being unsuitable for a police officer.

8. In Bill Wood's affidavit it is stated that I told him I had other jobs to do and that these jobs were necessary for me to make a living for my family. This is not true. One week before being dismissed as an officer on the Marion Police Department, I told Chief Wood that I had sent word to him that I would have to go out of town to take care of my income tax returns on the evening that the postponed radio technician's training session was scheduled to be held (referred to in

paragraph 5 above). At that time I told Chief Wood that the tax business was something I had to see about in order to take care of my family.

/s/ Carl D. Bishop
Affiant

[Jurat Omitted]

[Certificate of Service Omitted]

-49-

State of North Carolina

Department of Community Colleges

Vocational-Technical Division

Certificate

This is to Certify that:

CARL D. BISHOP

has completed in a satisfactory manner the prescribed Course of Study in

RIOT CONTROL AND SELF DEFENSE - 12 HOURS

Issued by the

McDowell Technical Institute

13th day of December 19 71

PRESIDENT — DIRECTOR OF INSTRUCTION — DIRECTOR OF EXTENSION — INSTRUCTOR

-50-

State of North Carolina

Department of Community Colleges

Vocational-Technical Division

Certificate

This is to Certify that:

DEAN BISHOP

has completed in a satisfactory manner the prescribed Course of Study in

POLICE FIRE ARMS TRAINING

Issued by the

McDowell Technical Institute

26 day of September 1969

PRESIDENT — DIRECTOR OF INSTRUCTION — DIRECTOR OF EXTENSION — INSTRUCTOR

-51-

State of North Carolina

Department of Community Colleges

Vocational-Technical Division

Certificate

This is to Certify that:

DEAN BISHOP

has completed in a satisfactory manner the prescribed Course of Study in

ADVANCED FIREARMS TRAINING

Issued by the

McDowell Technical Institute

5 day of Nov. 19 69

PRESIDENT DIRECTOR OF INSTRUCTION DIRECTOR OF EXTENSION INSTRUCTOR

-52-

State of North Carolina

Department of Community Colleges

Vocational-Technical Division

Certificate

This is to Certify that:

CARL BISHOP

has completed in a satisfactory manner the prescribed Course of Study in

SMALL FIREARMS TRAINING

Issued by the

McDowell Technical Institute

14 day of May 1970

PRESIDENT DIRECTOR OF INSTRUCTION DIRECTOR OF EXTENSION INSTRUCTOR

P. O. Box 10603
Biltmore Station
Asheville, N. C.

August 29, 1972

To Whom It May Concern:

On March 29, 1972 this writer was assisted by Marion Policeman, Dean Bishop.
Mr. Bishop was in the company of North Carolina State Highway Patrolman, Robert Jones.
Both Mr. Bishop and Patrolman Jones assisted this writer in a search of an out of state vehicle for narcotics.
Arrest were made, and this writer requested that Mr. Bishop drive the seized vehicle into Marion, N. C.
Mr. Bishop did so and futher aided this writer later developments of the case

during the remainder of the night.

/s/ Benjamin F. Wade

Benjamin F. Wade
Special Agent
NC SBI

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION
Civil No. SH-72-78

CARL D. BISHOP, Plaintiff, v. W. H. WOOD, etc., et al., Defendants.	AFFIDAVIT OF FRANK WILLIAMS

Frank Williams, being first duly sworn, deposes and says:

1. My name is Frank Williams. I am a resident of Marion, North Carolina. I am a policeman in the employ of the Marion, North Carolina, Police Department, and I have been employed in this position since September, 1971.

2. I am well acquainted with Carl D. Bishop, who was employed by the Marion Police Department as a patrolman from June

9, 1969, to March 31, 1972. I have served with Mr. Bishop in our official capacities on a number of occasions. I have oberved Mr. Bishop executing the duties of a policeman in a variety of situations. I feel that I am well able to assess Mr. Bishop's professional training, qualifications, attitude, and performance.

3. At all times Carl Bishop cooperated fully with fellow officers. He was easy to get along with, and well liked by all of his contemporaries. I cannot think of a single occasion when Mr. Bishop did not provide cooperation and assistance, when requested to do so, or when he saw the need.

4. While employed by the department, Carl Bishop always obeyed orders given by his supervisors. To my knowledge, there

is no instance when Mr. Bishop failed to follow an order of which he had knowledge, or attempted to evade or act contrary to the spirit of an order or other departmental directive.

5. Low morale did not prevail in the department or on any police shift when Mr. Bishop was employed as a patrolman. Mr. Bishop contributed to and helped build high morale among his fellow officers.

6. In all respects Carl Bishop conducted himself professionally while he was employed by the Marion Police Department. He was well suited for police work. He possessed and used the necessary training and experience to carry out his duties in an effective manner. He operated very efficiently, and he had one of the highest arrest and conviction records of

any patrolman on the police force. Mr. Bishop was courteous in his dealings with members of the public; in no instance was he arrogant or a bully.

/s/ Frank Williams
Affiant

[Jurat Omitted]

[Certificate of Service Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION
Civil No. SH-72-78

CARL D. BISHOP,	)	
	)	
Plaintiff,	)	
	)	
v.	)	AFFIDAVIT OF
	)	TOMMY BRYANT
W. H. WOOD, etc., et al.,	)	
	)	
	)	
Defendants.	)	

Tommy Bryant, being first duly sworn, deposes and says:

1. My name is Tommy Bryant. I am a resident of Marion, North Carolina. I am a patrolman in the employ of the Marion, North Carolina, Police Department, and I have been employed in this position since July, 1969.

2. I am well acquainted with Carl D. Bishop, who was employed by the Marion Police Department as a patrolman from June

9, 1969, to March 31, 1972. I have served with Mr. Bishop in our official capacities on a number of occasions. I have observed Mr. Bishop executing the duties of a policeman in a variety of situations. I feel that I am well able to assess Mr. Bishop's professional training, qualifications, attitude, and performance.

3. At all times Carl Bishop cooperated fully with fellow officers. He was easy to get along with, and well liked by all of his contemporaries. I cannot think of a single occasion when Mr. Bishop did not provide cooperation and assistance, when requested to do so, or when he saw the need.

4. While employed by the department, Carl Bishop always obeyed orders given by

his supervisors. To my knowledge, there is no instance when Mr. Bishop failed to follow an order of which he had knowledge, or attempted to evade or act contrary to the spirit of an order or other departmental directive.

5. Low morale did not prevail in the department or on any police shift when Mr. Bishop was employed as a patrolman. Mr. Bishop contributed to and helped build high morale among his fellow officers.

6. In all respects, Carl Bishop conducted himself professionally while he was employed by the Marion Police Department. He was well suited for police work. He possessed and used the necessary training and experience to carry out his duties in an effective manner. He operated very efficiently, and he had one of the highest arrest and conviction records of any pa-

trolman on the police force. Mr. Bishop was courteous in his dealings with members of the public; in no instance was he arrogant or a bully.

/s/ Tommy Bryant
Affiant

[Jurat Omitted]

[Certificate of Service Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION
Civil No. SH-72-78

CARL D. BISHOP,	)	
	)	
Plaintiff,	)	
	)	
v.	)	SUMMARY OF CITA-
	)	TIONS ISSUED BY
W. H. WOOD, etc., et al.,	)	EMPLOYEES OF MA-
	)	RION POLICE DE-
	)	PARTMENT
Defendants.	)	

From the Marion Police Department arrest book, one of defendants' official records, a copy of which is attached hereto and hereby submitted to the Court, plaintiff offers the following comparison of the number of arrests made by him with the number of arrests made by other employees of the department during the period of plaintiff's employment, June 9, 1969, to March 31, 1972:

Officer	Number of Arrests
Bishop (plaintiff)	336
Causby	247
Blankenship	111
Bryant	102
Trent	99
Williams	79
Arrowood	63
Queen	63
Elliott	55
Beck	33
Dixon	28
Roper	14
Wood	6
Fostner	5
Dillingham	3

Respectfully submitted,

/s/ Norman B. Smith
Attorney for Plaintiff
Norman B. Smith
Smith, Patterson, Follin
& Curtis
816 Southeastern Building
Greensboro, North Carolina
27401
Telephone: 919-275-8603

[Certificate of Service Omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION
Civil No. SH-72-78

CARL D. BISHOP, Plaintiff,	)	
v.	)	ORDER
W. H. WOOD, Chief of Police of the City of Marion, North Carolina, and others, Defendants.	)	

THIS MATTER is before the Court upon Motions for Summary Judgment filed by the plaintiff and the defendants; and

It appearing to the Court that the defendants' Motion should be allowed for the reasons set forth in the Memorandum of Decision filed simultaneously herewith,

IT IS, THEREFORE, ORDERED that the defendants' Motion for Summary Judgment, be, and the same is hereby allowed, and plaintiff's action is hereby dismissed.

This the 29th day of August, 1973.

/s/ Woodrow W. Jones
Chief Judge, United States
District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
SHELBY DIVISION
Civil No. SH-72-78

CARL D. BISHOP, Plaintiff,	)	
v.	)	NOTICE OF APPEAL
W. H. WOOD, etc., et al., Defendants.	)	

NOW COMES Carl D. Bishop, the plaintiff in this action, and gives notice of appeal to the United States Court of Appeals for the Fourth Circuit, from the order and judgment entered August 29, 1973.

/s/ Norman B. Smith
Attorney for Plaintiff
Norman B. Smith
Smith, Patterson, Follin
& Curtis
816 Southeastern Building
Greensboro, North Carolina
27401
Telephone: 919-275-8603

DECISIONS OF THE LOWER COURTS

The initial decision of the United States Court of Appeals for the Fourth Circuit is set out at pages 25 - 29 of the Petition for Certiorari. The decision on rehearing by the United States Court of Appeals for the Fourth Circuit is set out at page 30 of the Petition for Certiorari. The decision of the United States District Court for the Western District of North Carolina is set out at pages 12 - 24 of the Petition for Certiorari.

Supreme Court, U. S.
FILED
JUN 26 1975
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1303

CARL D. BISHOP,

Petitioner,

vs.

W. H. WOOD, CHIEF OF POLICE
OF THE CITY OF MARION,
NORTH CAROLINA; VICTOR DENTON,
CITY MANAGER OF THE CITY OF
MARION, NORTH CAROLINA; and
THE CITY OF MARION, NORTH
CAROLINA, A MUNICIPAL CORPORATION,

Respondents.

* *

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

* *

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

* *

Charles E. Burgin
DAMERON & BURGIN
14 West Court Street
Marion, North Carolina 28752

Counsel for Respondents

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1303

CARL D. BISHOP,

Petitioner,

vs.

W. H. WOOD, CHIEF OF POLICE OF THE CITY OF MARION, NORTH CAROLINA; VICTOR DENTON, CITY MANAGER OF THE CITY OF MARION, NORTH CAROLINA; and THE CITY OF MARION, NORTH CAROLINA, A MUNICIPAL CORPORATION,

Respondents.

* *

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

* *

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

* *

Respondents pray that a writ of certiorari not issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on January 31, 1975.

STATEMENT OF THE CASE

From 1969 to 1972 the petitioner, Carl Bishop, was a policeman in the City of Marion, North Carolina. On March 31, 1972, his employment was terminated by the Chief of Police and City Manager. (R. 39). Prior to his discharge the petitioner was, on several occasions, given informal hearings and advised that he would be discharged if he persisted in his refusal to comply with departmental rules. (R. 14). After his discharge and at his request, petitioner was informed by letter that his dismissal was due to unsatisfactory work and failure to attend training schools. (R. 2).

The petitioner then brought this action in a Federal District Court against the City Manager and the Chief of Police in their official capacities, and the City of Marion. (R. 2). He alleged primarily that he was not given notice and a hearing prior to his dismissal in violation of the Fourteenth Amendment's guarantee of procedural due process. (R. 4). Cross-motions for Summary Judgment were filed by both sides. On the basis of the pleading, interrogatories and affidavits filed, the District Court granted Summary Judgment for the respondents. (R. 38-46).

REASONS FOR DENYNG THE WRIT

I. A MUNICIPALITY IS NOT A PERSON WITHIN THE MEANING OF 42 U.S.C. SECTION 1983 SO AS TO GIVE THE COURT JURISDICTION UNDER 28 U.S.C. 1343.

Injunctive relief and damages are sought by the petitioner against the City of Marion, North Carolina, a municipality. (R. 2-6). It is respectfully contended that the City of Marion is not subject to suit under 42 U.S.C. Section 1983. In City of Kenosha, Wisconsin v. Bruno, 412 U.S. 507, 93 S.Ct. 2222, 37

L.Ed.2d 109 (1973), this Court pointed out that a city is not a "person" under 42 U.S.C. Section 1983 where equitable relief is sought, anymore than it is where damages are sought. Admittedly, the only defendants in City of Kenosha, supra, were municipalities while in this action a municipality and two individuals are named as defendants. Nevertheless, the individual defendants in this action are being sued in their official capicities only (R. 2), and moreover, if a municipality is not a "person" for Section 1983 purposes, it should remain so regardless of how or with whom it is cast as a defendant.

II. A MUNICIPAL OFFICIAL WHO ACTS IN GOOD FAITH WITHIN THE SPHERE OF HIS OFFICIAL DUTIES IS IMMUNE FROM LIABILITY FOR DAMAGES.

This Court has recognized and applied the doctrine of qualified immunity from liability for damages to legislative officials, Tenny v. Brandhove, 341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951); judicial officers, Pierson v. Ray, 386 U.S. 547, 554, 87 S.Ct. 1213, 1218, 18 L.Ed.2nd 288 (1967); executive officials, Scheuer v. Rhodes, 416 U.S. 232, 247, 248, 94 S.Ct. 1683, 1692, 40 L.Ed.2d 90 (1974), and school board members, Wood v. Strickland, 95 S.Ct. 992, 998-999 (1975).

Section 1983 should be construed to extend to municipal officials a qualified immunity from liability for damages for essentially the same reasons expressed in Wood v. Strickland, supra, for granting school board members a qualified good-faith immunity. Common-law tradition allows it. Practical exigencies require it.

> "Implicit in the idea that officials have some immunity — absolute or qualified — for their acts is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it is better to risk some error and possible injury from such error than not to decide or act at all." Scheuer v. Rhodes, supra, 416 U.S. at 241-242.

The tort standards of good faith and reasonableness of action in light of attendant circumstances are the touchstones in deciding whether or not an official should be shielded from liability for damages by the immunity doctrine.

Petitioner does not contend in his petition to this Court that the City Manager or the Chief of Police, in discharging him, acted in bad faith, with malicious intent, or that they knew or reasonably should have known that their action would deprive him of constitutional rights.

Excluded from the good-faith standard is the requirement that officials must anticipate changes in constitutional law. Wood v. Strickland, supra, 95 S.Ct., at 1001; Pierson v. Ray, supra, 386 U.S., at 557; Kirstein v. Rector and Visitors of University of Virginia, 309 F.Supp. 184 at 188-189 (ED Va. 1970). Petitioner's discharge occurred on March 31, 1972. Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2nd 548 (1972), and Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972), were both decided on June 29, 1972, more than three months later.

Petitioner has not alleged nor attempted to show that the City Manager or the Chief of Police acted outside the scope of their duties, or in any manner other than as required by the City's Personnel Ordinance, or in an arbitrary misuse or abuse of the authority lawfully delegated to them.

The petitioner was not discharged without any reason. He was not disharged for a constitutionally impermissible reason. He was discharged for cause—unsatisfactory work and failure to attend training schools. (R. 2).

III. PETITIONER HAS FAILED TO ESTABLISH JURISDICTION BY VIRTUE OF 28 U.S.C. SECTION 1331 (a).

An alternate basis for invoking jurisdiction of the Federal District Court was alleged by petitioner to be the necessary controversy requirement of 28 U.S.C. Section 1331(a). But as Judge Winter noted in his dissenting opinion, "Whether $10,000.00 is at issue is sharply contested . . ." (Appendix, Petition, p. 29). Respondents have put petitioner to proof of this fact by specifically denying its existence. In view of Respondent's denial, petitioner may not rest on mere allegation. He must prove the allegation. In City of Kenosha v. Bruno, supra, this Court said:

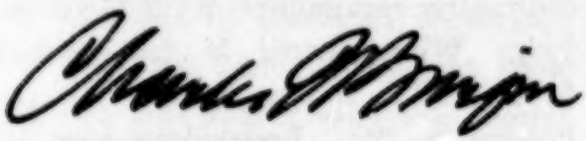
> "But although appellees in the Racine denials alleged jurisdiction pursuant to 28 U.S.C. Section 1331 as well as 1343, and in each complaint there was an allegation of an investment in a tavern of at least $20,000.00, the defendant municipal corporations answered by putting the appellees to their proof as to the amount in controversy. Since the cases were submitted and decided on cross-motions for summary judgment and stipulations of fact, and no stipulation as to the amount in controversy was filed, we cannot say on this state of record whether or not jurisdiction over the complaints was affirmatively established. Id. at 515, 93 S.Ct. at 2227.

As in City of Kenosha, this case was submitted and decided by the District Court on cross-motions for summary judgment. Again, as in City of Kenosha, the Court ". . . cannot say on this state of record whether or not jurisdiction over the complaints was affirmaitvely established . . ." Id. at 515, 93 S.Ct. at 2227.

CONCLUSION

For the reasons set forth above, respondents pray that the Petition for Certiorari be denied.

Respectfully submitted,



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Supreme Court, U. S.
FILED
DEC 4 1975
MICHAEL RODAK, JR., CLERK

PETITIONER'S BRIEF

SUPREME COURT OF THE UNITED STATES

October Term, 1975

74-
No. 1303

CARL D. BISHOP,

Petitioner,

v.

W. H. WOOD, CHIEF OF POLICE OF THE CITY OF MARION, NORTH CAROLINA; VICTOR DENTON, CITY MANAGER OF THE CITY OF MARION, NORTH CAROLINA; and THE CITY OF MARION, NORTH CAROLINA, A MUNICIPAL CORPORATION,

Respondents.

****

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

****

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Counsel for Petitioner

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PETITIONER'S BRIEF

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 1303

CARL D. BISHOP,

Petitioner,

v.

W. H. WOOD, CHIEF OF POLICE OF THE CITY OF MARION, NORTH CAROLINA; VICTOR DENTON, CITY MANAGER OF THE CITY OF MARION, NORTH CAROLINA; and THE CITY OF MARION, NORTH CAROLINA, A MUNICIPAL CORPORATION,

Respondents.

****

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

****

CITATIONS TO OPINIONS BELOW

The January 31, 1975, opinion of the United States Court of Appeals for the Fourth Circuit is not published. This

opinion was rendered after a rehearing en banc. The initial opinion of the United States Court of Appeals for the Fourth Circuit is published at 498 F.2d 1341 (1974). This action originated in the United States District Court for the Western District of North Carolina. The district court's opinion is published at 377 F.Supp. 501 (1973).

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 31, 1975. Petition for writ of certiorari was filed in the Court on April 16, 1975, within the time provided by 28 U.S.C. sec. 2101 (c). Jurisdiction of the Court is invoked under 28 U.S.C. sec. 1254 (1). Jurisdiction of the court of first instance in the United States District

Court for the Western District of North Carolina was founded upon 42 U.S.C. sec. 1983, 28 U.S.C. sec. 1343(3), and 28 U.S.C. sec. 1331(a).

QUESTIONS PRESENTED

1. Whether a public employee, who has completed his probationary period and has become a permanent employee, and who can be discharged only for certain statutory reasons, has the right not to be discharged without notice and hearing.

2. Whether a policeman can be constitutionally dismissed without notice and hearing, when charged with not following orders, insubordination, causing low morale, and engaging in conduct unsuited to an officer.

3. Whether giving a public employee oral notice at time of dismissal followed by written reasons, fulfills procedural

due process requirements.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

Amendment XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CODE OF ORDINANCES OF THE CITY OF MARION, NORTH CAROLINA

Personnel Ordinance

> A permanent employee whose work is not satisfactory over a period of time shall be notified in what way his work is deficient and what he must do if his work is to be satisfactory. If a permanent employee

> fails to perform work up to the standard of the classification held, or continues to be negligent, inefficient, or unfit to perform his duties, he may be dismissed by the City Manager. Any discharged employee shall be given a written notice of his discharge setting forth the effective date and reasons for his discharge if he shall request such a notice. (A. 6-7,15).

STATEMENT OF THE CASE

PROCEEDINGS IN THE LOWER COURTS

Petitioner, a former police officer of the City of Marion, North Carolina, brought an action in the United States District Court for the Western District of North Carolina, Shelby Division, against respondents, W. H. Wood, Chief of Police, Victor Denton, City Manager, and the City of Marion, North Carolina, pur-

suant to 42 U.S.C. sec. 1983, contending that his rights under the Fourteenth Amendment were violated when he was discharged from his police job. He sought an order requiring respondents to reemploy him and a back pay award. (A. 3-10).

Cross-motions for summary judgment were filed. The district court granted respondents' motion for summary judgment and dismissed the action by opinion and order entered August 29, 1973. 377 F.Supp. 501 (1973). (Petition for Certiorari, pp. 12-24). The United States Court of Appeals for the Fourth Circuit in its initial decision of June 21, 1974, adopted per curiam the judgment of the district court, over the dissent of Judge Winter. 498 F.2d 1341 (1974). (Petition for Certiorari, pp. 25-29). A petition for rehearing en banc was granted by the

Court of Appeals, and on January 31, 1975, an order was entered affirming the judgment of the district court "by an equally divided court". (Petition for Certiorari, p. 30).

STATEMENT OF FACTS

Petitioner Carl D. Bishop was employed as a policeman on June 9, 1969, by respondents, the Chief of Police and City Manager of Marion, North Carolina. (A. 57-58). He successfully completed the required six month probationary term, and was thereafter classified as a permanent employee of the City. (A. 19,24; Petition for Certiorari, p. 13).

The Marion Personnel Ordinance provides that the only permanent employees subject to dismissal are those who (1) fail to perform work up to standard, (2) are negligent, (3) are inefficient, or

(4) are unfit to perform duties; and that permanent employees cannot be discharged unless, first, they are notified of the deficiency, and second, they continue to perform in the deficient manner. (A. 6-7).

After nearly three years of uninterrupted service on the police force, petitioner was summarily discharged by respondents on March 31, 1972. (A.4-5, 13-14). No hearing either before or after the dismissal was granted petitioner. (A. 7,15). Petitioner's evidence, which is substantially uncontradicted, is that the Chief of Police and City Manager refused to discuss the matter with him when he was discharged. He was told by the City Manager, "If you pursue this matter any more, it will get worse." (A. 39-40). In response to his request, petitioner was later given a written

statement of the reasons for his discharge. (A. 14).

The Chief of Police, advancing his reasons for the firing, stated that petitioner had not followed orders concerning radio classes, high speed chases, checking business establishments and making routine patrols, had been insubordinate, had caused low marale, and that a complaint had been received that he engaged in conduct unsuited to an officer. (A. 32-34).

With respect to the allegation that he had disobeyed orders concerning attendance of radio school, petitioner showed that he had just cause to be absent from the radio training sessions he missed. When one of the sessions was scheduled, and as he was on his way to class, a State Bureau of Investigation agent and

a State Highway Patrolman asked him to take part in a drug raid. (Supporting statements by the patrolman and agent are in the record. (A. 43-44, 53-56).). When a second session was scheduled, he was so ill with the intestinal flu at home that he doesn't believe he could have gotten from the bathroom to the telephone to call in an excuse had he thought to do so. When a third session was scheduled, he was on vacation and would have attended anyway, but received word the session was postponed. When this session was rescheduled, it was in conflict with petitioner's plans to go to another city to fill out his income tax returns that were soon to be due, and he sent his excuse to the police chief in advance. Petitioner attended all other training sessions required of members of the Marion

Police Department, receiving certificates and credits for courses in riot control, self defense and small arms. (A. 42-45, 49-52).

As to the other allegations of not following orders, petitioner stated that he was never given any orders pertaining to checking business establishments or answering routine patrol calls, and that after he and several other officers were instructed as a group not to engage in high speed chases outside the city limits, he never again made a pursuit of this type. (A. 41).

Petitioner's evidence, including affidavits from officers still on the police force, was that he was always cooperative with fellow officers, that he always accepted and carried out orders given by his supervisors, that he was not the

cause of any low morale, and that he never told the Chief of Police he had other jobs to do in order to support his family. Further he has no notice or knowledge of any accusation by a supervisor that he had engaged in conduct unsuitable to an officer; he does not believe any of his conduct could have been interpreted in this way; and the supervisor in question had done nothing but praise his conduct as a policeman. (A. 45-47, 57-64).

Petitioner had the highest arrest rate and one of the highest conviction rates of any policeman on the force. (A. 59-60, 63-64, 65-67). He believes that he was discharged because he enforced the law fairly and equally and without evincing any political or social favoritism. (A. 6).

SUMMARY OF THE ARGUMENT

I. A Public Employee, Who Has Completed his Probationary Period and has Become a Permanent Employee, and who can be Discharged Only for Certain Statutory Reasons, has the Right not to be Discharged Without Notice and Hearing.

Public employees have constitutionally protected property rights in their continued employment if they have contractual, statutory, or other objective expectancy that their jobs will not be terminated. These protections are available to a policeman.

A. Petitioner's Employment Rights Were Grounded in Statute.

The Marion Personnel Ordinance allows permanent employees to be dismissed only if they fail to perform work up to

standard, are negligent, are inefficient, or are unfit; and only after they are first notified of the deficiency and, second continue to perform in a deficient manner. This ordinance creates statutory rights of continued employment, which are protected under the Fourteenth Amendment.

B. Petitioner Had an Implied Promise or Other Objective Expectancy of Continued Employment.

Petitioner was classified as a permanent employee by the City of Marion, having successfully completed his probationary term. Permanent employees, who are no longer in a training or probationary status, have the objective expectancy of continued employment, so that they have a due process property interest in their job, in the absence of statute or

contract provision to the contrary.

II. A Policeman cannot Constitutionally be Dismissed without Notice and Hearing, when Charged with not Following Orders, Insubordination, Causing Low Morale, and Engaging in Conduct Unsuited to an Officer.

If a public employee is accused of misconduct, he has a constitutional liberty right, which requires that procedural due process be observed in discharging him. In this case petitioner was allegedly discharged for insubordination, causing low morale, engaging in conduct unsuited to an officer, refusing to cooperate with other officers, and violating orders of his superiors. These charges against petitioner were of such a nature that his constitutional liberty interests made it necessary to adhere to

due process in the discharge procedure.

III. Giving a Public Employee Oral Notice at Time of Dismissal Followed by Written Reasons, does not Fulfill Procedural Due Process Requirements.

Petitioner was given oral notice of summary discharge. He was not then given reasons for the dismissal, but upon request he received a post-discharge written statement of reasons. He was not warned, counseled, or advised about his conduct before being fired. No hearing was held either before or after discharge. The Marion Personnel Ordinance requires that before being discharged an employee be notified of the deficiency in his work

and be told how to remedy it, and that he fail to correct the deficiency. Respondents' failure to follow the procedures contained in this ordinance in firing petitioner, as well as their refusal to accord petitioner a hearing, denied him the due process of law.

ARGUMENT

I. A PUBLIC EMPLOYEE, WHO HAS COMPLETED HIS PROBATIONARY PERIOD AND HAS BECOME A PERMANENT EMPLOYEE, AND WHO CAN BE DISCHARGED ONLY FOR CERTAIN STATUTORY REASONS, HAS THE RIGHT NOT TO BE DISCHARGED WITHOUT NOTICE AND HEARING.

In Board of Regents v. Roth, 408 U.S. 564, 567-78, n.16 (1972), and Perry v. Sindermann, 408 U.S. 593, 601-02 (1972) this Court delineated conditions under which public employees cannot be discharged without the observation of procedural due process requirements;

(a) Where an office is held under tenure provisions;

(b) During the term of an existing employment contract;

(c) Where the right to employment is grounded in statute;

(d) Where there is a clearly implied promise of continued employment;

(e) Where the employment practices in question have evolved into a "common law" of continued employment;

(f) In any other situation in which the employee has an objective expectation of continued employment (more than an abstract need, desire or unilateral expectation of continued employment).

These cases concerned employment rights of members of the teaching profession, but certainly the Court intended these job security rights to extend to governmental employees generally, federal, state and local. This was confirmed by Arnett v. Kennedy, 416 U.S. 134 (1974), involving a federal civil service em-

ployee, a field representative of the Office for Economic Opportunity. "Policemen, like teachers and [government administrators] . . . are not relegated to a watered-down version of constitutional rights." Garrity v. New Jersey, 385 U.S. 493, 500 (1967). Petitioner's dismissal was subject to the limitations enunciated in Roth and Sindermann.

A. PETITIONER'S EMPLOYMENT RIGHTS WERE GROUNDED IN STATUTE.

As an employee of the City of Marion, North Carolina, petitioner was subject to the Marion Personnel Ordinance, which provided:

> A permanent employee whose work is not satisfactory over a period of time shall be notified in what way his work is deficient and what he must do if the work is to be satisfactory.

> If a permanent employee fails to perform work up to the standard of the classification held, or continues to be negligent, inefficient, or unfit to perform his duties, he may be dismissed by the City Manager. (A. 6-7).

According to this ordinance, the only permanent employees subject to dismissal are those who (1) fail to perform work up to standard, (2) are negligent, (3) are inefficient, or (4) are unfit to perform duties. And these employees may not be discharged unless, first, they are notified of the deficiency; and, second, they continue to perform in the deficient manner.

There is a protected Fourteenth Amendment property interest in a public job if statutory provisions guarantee continued employment absent sufficient cause for discharge. Board of Regents v.

Roth, 408 U.S. at 576-78. Following Sinderman and Roth, the lower courts found constitutionally protected property interests in employment in the contexts of state and local legislation including civil service laws, Snead v. Department of Social Services, 355 F.Supp. 764 (S.D.N.Y. 1973), vacated and remanded, 416 U.S. 977 (1974), on remand, case no. 72 Civ. 4536, Nov. 18, 1974; veterans' preference statutes, Fitzgerald v. Hampton, 467 F.2d 755 (D.C. Cir. 1972); and teacher tenure legislation, Sigmon v. Poe, 381 F.Supp. 387 (W.D. N.C. 1974). This Court applied the Sindermann-Roth principles to the federal civil service laws in Arnett v. Kennedy. Consistent with this authority it must be held that the Marion Personnel Ordinance, which enumerates causes for dismissal and requires the opportunity for warning and

reform, creates a right of employment grounded in statute, to which the procedural due process requirements adhere.

B. PETITIONER HAD AN IMPLIED PROMISE OR OTHER OBJECTIVE EXPECTANCY OF CONTINUED EMPLOYMENT.

According to the ordinances and practices of the City of Marion, newly hired policemen and other employees are probationary employees for the first six months and thereafter they are permanent employees. (A. 19,24; Petition for Certiorari p. 13). Petitioner had served as a policeman for nearly three years at the time of his discharge. (A. 4-5, 13-14).

Petitioner's position, alternative to that asserted in Argument I.A., supra., is that once a government worker successfully completes probationary or appren-

ticeship and becomes a permanent employee, he has a property right which necessitates that his discharge comport with due process requirements.

In Roth the Court indicated that the property interests subject to due process protection, are not created by the Constitution, but are defined by rules and understandings derived from the employer-employee relationship in the context of local law, common practice and agreement. 408 U.S. at 577. Neither the City of Marion nor the State of North Carolina has expressly guaranteed trial type pre-discharge proceedings for employees in petitioner's situation. Thus, according to Roth it is incumbent on the Court to take a common sense view of the

common practices of employment carried on by this municipality.

Probationary employees have no constitutionally protected property interest in continued employment (absent agreement or law to the contrary). Jenkins v. U.S. Post Office, 475 F.2d 1256 (9th Cir. 1973); Harnet v. Ulett, 466 F.2d 113 (8th Cir. 1972). On the other hand, there should be no question but what the employee, who has spent most of his working years in government service, whose record is unblemished, who has been re-employed or retained year after year, has the objective expectancy of continued employment contemplated by Roth and Sindermann that triggers due process protections.[1]

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[1] Compare the Fourth Circuit's decision in the instant case (Petition for Certiorari, pp. 12-22, 25-26) with its decision in Johnson v. Fraley, 470 F.2d 119 (4th Cir. 1972) (29 years of service).

The public servant of longstanding employment has a continuing need and expectation of his job. In Bell v. Burson, 402 U.S. 535 (1971), the Court held that a driver's license, once issued, cannot be suspended without observing due process requirements. There the Court characterized the continued possession of a license as possibly "essential in the pursuit of a livelihood". 402 U.S. at 539. In the present case the due process guarantees are even more essential, because it is the livelihood itself that is at stake.

Where along this continuum from trainee to lifetime career employee should the constitutionally protected property interest emerge? The logical transitional point is where the employee completes his probationary period and is appointed a permanent employee. At this point

training, apprenticeship, and orientation are over; career status has begun. The term "permanent" is clearly consistent with the concepts of objective expectancy and implied promise of continuance that the Court dealt with in Roth and Sindermann. See pp. 18-19, supra. Of course, by law the federal, state or municipal legislative body, or by contract the employer and employee, can make a different determination, and that determination would be controlling, Roth, 408 U.S. at 577, but in the absence of law or agreement to the contrary, the transition from probationary employee to permanent employee should create the property right.

It is instructive that the typical

civil service law[2] and the typical collective bargaining contract[3] provide for job security once the probationary or training period is completed.[4] Since there is a great deal of overlap of protection

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[2] Collected in Smith & Geballa, Job Security for Public Employees, 31 Washington & Lee L.Rev., 545, 567-71 (1974).

[3] See Public Workers and Public Unions [Zagoria ed. 1972].

[4] More than 90% of all police departments subject to a survey reported that new appointees serve at first on probationary status. President's Commission on Law Enforcement, Task Force Report: The Police 132 (1967). The probationary period is used by police agencies to evaluate performance, to train and test the recruit with the practical problems of field work, to counsel him and assist in overcoming his faults. Municipal Police Administration 180-81 (George D. Eastman ed. 1971). The probation period affords an opportunity for "dismissing the inept recruit in the early stages of his service . . . before he has acquired the extraordinary protection thrown about him by tenure-of-office acts." Bruce Smith, Police Systems in the United States 132 (1960).

to public employees from procedural due process rights, collective bargaining contracts, and civil service laws, i.e., a government worker may have his job security protected simultaneously from two or more of these sources, such symmetry will tend to avoid forum shopping, jurisdictional conflicts, and other confusion and inconvenience.

If the view that constitutionally protected property rights inure upon achievement of permanent status were not accepted, the promises of Roth and Sindermann will be unfulfilled. In these cases due process protection is specifically accorded the holders of positions under tenure provisions, persons with employment contracts, and those whose rights are grounded in statute. But these cases go

further and hold Fourteenth Amendment property rights exist where there is any "objective expectancy" of continued employment, as well as where there is a clearly implied promise or where practices have evolved into a "common law" of continued employment. Board of Regents v. Roth, 408 U.S. at 576-78, n.16, Perry v. Sindermann, 408 U.S. at 601-02. These latter categories clearly have some application apart from cases where statutory and contract rights are present; else the Court would not have enumerated them. The conclusion is inescapable that a public employee who has completed probation and has achieved permanent status has an objective expectancy of continued employment that is subject to Fourteenth Amendment guarantees. Accord, Zimmerer v. Spencer, 485 F.2d

176 (5th Cir. 1973); Puckett v. Mobile City Commission, 380 F.Supp. 593 (S.D. Ala. 1974).

II. A POLICEMAN CANNOT CONSTITUTIONALLY BE DISMISSED WITHOUT NOTICE AND HEARING, WHEN CHARGED WITH NOT FOLLOWING ORDERS, INSUBORDINATION, CAUSING LOW MORALE, AND ENGAGING IN CONDUCT UNSUITED TO AN OFFICER.

In Board of Regents v. Roth, 408 U.S. 564, 573 (1972), the Court established that a public employee's right to liberty is violated, when he is discharged without notice and hearing after having been accused of misconduct. In Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971), the Court had decided that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."

Roth requires that procedural due process be satisfied before an employee is dismissed where a charge has been made "that might seriously damage his standing and associations in the community . . ., for example, that he has been guilty of dishonesty, or immorality." 408 U.S. at 573.

The Court in Roth expressed a concern about the likelihood of the government's imposition on the employee of a "stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." 408 U.S. at 573. The right to "liberty" includes the right "to engage in any of the common occupations of life". Meyer v. Nebraska, 262 U.S. 390, 399 (1923). Where future employment opportunities are threatened or foreclosed, procedural due process applies. Joint Anti-Fascist Refugee Committee v. McGrath,

341 U.S. 123, 185 (1951) (Jackson,J., concurring); Schware v. Board of Bar Examiners, 353 U.S. 232, 238 (1957).

In this case the respondents' alleged reasons for discharging petitioner were that he was insubordinate, caused low morale, engaged in conduct unsuited to a police officer, refused to cooperate with other officers, and violated orders of his supervisors. (A. 32-34). As Circuit Judge Winter correctly said in his dissenting opinion, "Accusations of this nature made against one engaged in the occupation of a law enforcement officer manifestly have a severe adverse impact upon future employment opportunities, and it can be reasonably expected that defendants would disclose these reasons upon the request of a person considering plaintiff's employment who inquired of

the respects in which plaintiff's work had been unsatisfactory. To my mind, it therefore follows that procedural due process should apply, and as a minimum plaintiff should have been given notice of and afforded an opportunity to refute the charges before he was dismissed." (Petition for Certiorari, p. 28).

The authorities on the subject are unanimous in the view that applicants for police jobs must be and are subjected to rigorous background investigations and that only those who are reported to possess the highest order of character should be employed. "The need for public trust respect, and confidence in the police service, and the responsibilities entrusted to police officers, preclude employment of the dishonest, the immature, the lazy, the

immoral, or the unreliable."[5] The charges made against petitioner of defiance of orders, insubordination, causing low morale, and acts "unsuited to an officer" most certainly would stand in the way of his ob-

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[5] National Advisory Commission on Criminal Justice Standards and Goals, Police 339-40 (1973). Accord, Municipal Police Administration 178 (G.D. Eastman ed. 1971). Nearly 98% of the cities surveyed reported that background character investigations of applicants for police jobs are used. President's Commission on Law Enforcement, Task Force Report: The Police 129 (1967). See Goss v. Lopez, ___ U.S. ___, 95 S.Ct. 729 (1975), where the Court found a constitutionally protected liberty interest on the part of a school child threatened with disciplinary proceedings in part because of the probable effect that the record of such charges would have on future employment opportunity.

taining another job in his chosen field. See Casey v. Roudebush, 395 F.Supp. 60 (D.C.Md. 1975) (Discharged policeman had protected liberty interest where charges would likely interfere with future employment in this occupation.).

Petitioner's affidavits are to the effect that each of these charges was baseless and could have been established to be so, had he been given the hearing to which he was entitled. Since this case was decided on summary judgment, the truth of petitioner's affidavits must be assumed here. Rule 56, Rules of Civil Procedure.

The lower courts, this case excepted, have uniformly held that notice and hearing are required, when stigmatizing charges have been made against a public employee. E.g., Sims v. Fox, 492 F.2d

1088 (5th Cir. 1974) (unfitness and unsuitability) and Simmonds v. Government Employees' Service Commission, 375 F.Supp. 934 (D.C.V.I. 1974) (insubordinate and continuing to fail to comply with rules and regulations).[6]

Because the charges that brought about petitioner's dismissal put his good name, reputation, honor, and integrity in issue, he was entitled to notice and hearing by the Court's decision in Roth.

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[6] Compare the Fourth Circuit's decision of the present case to its decision in McNeil v. Butz, 480 F.2d 314 (4th Cir. 1973), that government workers discharged for improperly procuring agricultural program payments, were entitled to procedural due process because of deprivation of liberty.

III. GIVING A PUBLIC EMPLOYEE ORAL NOTICE AT TIME OF DISMISSAL FOLLOWED BY WRITTEN REASONS, DOES NOT FULFILL PROCEDURAL DUE PROCESS REQUIREMENTS.

Because petitioner had both a property interest (Argument I, supra.) and a liberty interest (Argument II, supra.) in continued employment, he could be constitutionally dismissed only if procedural due process requirements were satisfied.

Petitioner was summarily discharged. His affidavits are to the effect that an explanation of the basis for the dismissal was not given at the time, and that in fact the Chief of Police and City Manager refused to discuss the matter with him. (A. 7, 39-40). Respondents' affidavits are not clear on this point.

(A. 30-31). On summary judgment it was unquestionably erroneous for the district court to find that petitioner was given a statement of reasons at the time of discharge. (Petition for Certiorari, p. 15). Rule 56, Rules of Civil Procedure. It is agreed that petitioner was later given a written statement of reasons for the discharge. (A. 5-6). Petitioner's affidavit establishes that before discharge he was never notified that his work was deficient, nor told what he must do to make his performance satisfactory. (A. 5, 41-42).

Of course, there was no pre- or post-discharge hearing, petitioner was never able to confront and examine his

accusers, he was never given the opportunity to respond to or present his position about the charges, he was not permitted to offer evidence in his behalf, and he was not even allowed to discuss the reasons for termination with his employer.

The Personnel Ordinance of the City of Marion requires that to effect the dismissal of a permanent employee, it is necessary (1) to notify him of the deficiency in his work and tell him what he must do to render it satisfactory, (2) that the employee continue to be a substandard performer, negligent, inefficient or unfit, (3) upon request he be given a written notice of the discharge setting forth the reasons.

This summary judgment record establishes requirement number (3) as the only one that was satisfied in connection with petitioner's dismissal.

In Arnett v. Kennedy, 416 U.S. 134 (1974) a plurality opinion of this Court expressed that the post-discharge hearing provided in the Lloyd-LaFollette Act was not constitutionally deficient, because this provision was a part of the same statute which granted the Roth-Sindermann substantive right to continued employment, and the substantive right cannot be claimed without accepting the procedure that goes along with it. An analysis of the various opinions of the court led Justice White to conclude in his concurring and dissenting opinion, that a hearing was constitutionally,

as well as statutorily, necessary. "While the State may define what is and what is not property, once having defined those rights the Constitution defines due process, and as I understand it at least six members of the Court are in agreement on this fundamental proposition." 416 U.S. at 185.

Recently the Court has relaxed the constitutional requirements for administrative due process by balancing competing interests of control, safety, and security in the contexts of prison and public school disciplinary proceedings. Wolff v. McDonald, 418 U.S. 539 (1974); Goss v. Lopez, ____ U.S. ____, 95 S.Ct. 729 (1975). In neither situation did the Court countenance dispensing with a hearing altogether.

Because the discharge of a public

employee does not entail problems analagous to the concern for control, safety, and security present in public school and prison disciplinary situations, it is required that the full panoply of procedural due process notice and hearing rights, as outlined in Goldberg v. Kelly, 397 U.S. 254 (1970), apply in the present case:

1. Timely and adequate notice of the charges.
2. Confrontation and cross examination of adverse witnesses.
3. Presentation of his own evidence and arguments.
4. Representation by retained counsel.
5. Reasoned decision based on the evidence.
6. Impartial decision makers.

At least six members of this Court,

Arnett v. Kennedy, 416 U.S. at 185, are on record as requiring a full and fair hearing incidental to the discharge of a public employee. "The fundamental requisite of due process of law is the opportunity to be heard". Grannis v. Ordean, 234 U.S. 385, 395 (1914). Even applying the tests of the Arnett plurality opinion, petitioner's constitutional rights were violated, since two of the three procedural requirements of the Marion Personnel Ordinance were not satisfied.

By no application or reasonable extension of any prior decision of this Court, or of any recognized constitutional principle, can it be said that petitioner's discharge was consistent with procedural due process of law.

CONCLUSION

For the reasons set forth above, it

is respectfully prayed that the decision of the United States Court of Appeals for the Fourth Circuit be reversed, and this case be remanded with directions that it be tried on its merits.

Respectfully submitted,

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RESPONDENTS' BRIEF

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

74-
No. 1303

CARL D. BISHOP, *Petitioner,*

v.

W. H. WOOD, *et al., Respondents.*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER A FEDERAL DISTRICT COURT HAS JURISDICTION OVER A SECTION 1983 CLAIM WHEN A MUNICIPALITY HAS BEEN NAMED, ALONG WITH ITS EMPLOYEES IN THEIR OFFICIAL CAPACITIES, AS DEFENDANT.

II. WHETHER THE $10,000.00 JURISDICTIONAL REQUIREMENT OF 28 U.S.C. SECTION 1331(a) IS SATISFIED BY ALLEGATIONS IN THE COMPLAINT, WITHOUT MORE, WHEN SUCH ALLEGATIONS HAVE BEEN DENIED.

III. WHETHER THE PETITIONER HAD SUCH AN INTEREST IN HIS EMPLOYMENT THAT HIS DISCHARGE AMOUNTED TO A DEPRIVATION OF PROPERTY OR LIBERTY.

A. Did petitioner's discharge from his public employment deprive him of a constitutionally protected property interest.

B. Did petitioner's discharge deprive him of a constitutionally protected liberty interest.

STATEMENT OF THE CASE

On June 9, 1969, Petitioner Carl Bishop was hired by the City of Marion, North Carolina, as a probationary policeman. (A. 57-58) At the end of six months employment, his status changed to that of a permanent employee (A. 19, 24). He continued in the employ of the City until March 31, 1972, when his employment was terminated by the Chief of Police and the City Manager (A.13). After his dismissal and at his request, Bishop was informed by letter that his dismissal was due to unsatisfactory work and failure to attend training schools. (A. 14)

Several months prior to his discharge, Bishop had been the cause of personnel problems, (A. 29-32), and on several occaisions had been warned and counseled by the Chief of Police about his poor attitude and his failure to abide by regulations (A. 25, 29, 30). However, the Chief took no independent action against him, but conferred with the City Manager and was instructed to again "discuss the problem areas with Bishop and make him aware of the consequences if he failed to bring his level of performance up to an acceptable manner" (A. 30). One or two weeks after this conference, Bishop was discharged after the Chief informed the City Manager of his continuing refusal to abide by the Chief's requests. (A. 30) Thereupon this action was instituted by Bishop seeking reinstatement and back pay. (A. 9; Petitioner's brief, 6)

ARGUMENT

I. A FEDERAL DISTRICT COURT HAS NO JURISDICTION OVER A SECTION 1983 CLAIM WHEN A MUNICIPALITY HAS BEEN NAMED, ALONG WITH ITS EMPLOYEES IN THEIR OFFICIAL CAPACITIES, AS DEFENDANT.

Enacted by Congress in 1871, and referred to as the Civil Rights Act of 1871 or the Ku Klux Klan Act, 42 U.S.C. 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, *privileges*, or immunities secured by the constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Simply interpreted, the statute prohibits, on pain of civil liability, any "person" from depriving another of federally protected rights.

In 1961, The United States Supreme Court held that a municipality was not a "person" subject to an action for damages for the unlawful acts of its employees within the purview of 42 U.S.C. Section 1983. *Monroe v. Pape*, 365 U.S. 167 (1961). More than a decade later, *Monroe* was reaffirmed in *Moor v. County of Alameda*, 411 U.S. 693 (1973) and then extended in *City of Kenosha v. Bruno*, 412 U.S. 507 (1973). In *Kenosha*, this Court pointed out that the word "person" in

Section 1983 did not apply to a municipality where equitable relief was sought any more than where damages are sought. *Id* at 514.

In his complaint, the petitioner, Carl Bishop, names as defendants the City of Marion and two of its employees, the Chief of Police and City Manager, in their official capacities. Petitioner's primary allegation is that he was not given notice and a hearing prior to his dismissal in violation of the Fourteenth Amendment's guarantee of procedural due process, (A. 8) and the relief requested is reinstatement and back pay. (A. 9; Petitioner's brief, p. 6)

Petitioner's grievance is against the City of Marion. He does not allege personal culpability on the part of the City Manager or Chief of Police. He does not seek to hold either personally liable for he has not cast them as parties individually. (A. 3) There is no substantial accusation against either official that he acted outside the scope of authority or arbitrarily misused or abused lawfully delegated authority. The gravamen of the complaint against the two municipal officers is that they were instruments of the City. Their representative presence therefore adds nothing to jurisdiction.

Personal involvement and individual culpability are the target objects of 1983 relief. *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1972), cert. denied 404 U.S. 1049 (1972); *Bennett v. Gravelle*, 323 F.Supp 203, *aff'd*, 451 F.2d 1011 (1st cir. 1971), cert. dismissed 407 U.S. 917 (1972). When recovery is sought from the public treasury and parties are named defendants in their representative capacities, no jurisdiction to hear the claim exists for the statute is aimed at

individuals rather than the governmental entities which employ them. In *Moor v. County of Alameda, supra*, there were allegations of Section 1983 violations by the Sheriff, several deputies individually and their employer, the County of Alameda. Dismissal by the District Court of all claims against the County was affirmed by the Ninth Circuit Court of Appeals[1] and this Court.

Had petitioner in this case wished to asset a cause of action against the City Manager and Chief of Police as individuals, he could have done so simply by casting them as defendants individually. For though restricted in its impact against governmental entitics, effective redress for Section 1983 injuries by individuals is very much available, and such actions face no 1983 jurisdictional barrier.[2] Only last year this Court unanimously[3] reaffirmed the viability of Section 1983 in damage actions against individuals. *Scheuer v. Rhodes*, 94 S.Ct. 1683 (1974). In *Scheuer*, state executives were charged with abuse of their governmental powers. This Court concluded that:

> "When a state officer acts under a state law in a manner violative of the Federal Constitution, he 'comes into conflict with the superior authority of that constitution, and he is in that case stripped of his official or representative capacity and is subjected in his person to the consequences of his individual conduct' " 94 S.Ct. at 1687, quoting *Ex Parte Young*, 209 U.S. 123, 159-60 (1908).

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[1] *Moor v. Madigan*, 458 F.2d 1217 (9th Cir. 1972)

[2] By Section 1983's jurisdictional counterpart, 28 U.S.C. 1343.

[3] The decision was 8-0. Mr. Justice Douglas did not participate.

Petitioner's action is clearly not directed against a "person" and the complaint should be dismissed for its failure to state a claim cognizable under 42 U.S.C. Section 1983.

II. THE $10,000.00 JURISDICTIONAL REQUIREMENT OF 28 U.S.C. SECTION 1331(a) IS NOT SATISFIED BY ALLEGATIONS IN THE COMPLAINT, WITHOUT MORE, WHEN SUCH ALLEGATIONS HAVE BEEN DENIED.

An alternate basis for invoking jurisdiction of the Federal District Court was alleged by petitioner to be the necessary controversy requirement of 28 U.S.C. Section 1331(a). But as Judge Winter of the Fourth Circuit Court of Appeals noted in his dissenting opinion, "Whether $10,000.00 is at issue is sharply contested..." (Petition for certiorari, p. 29). Respondents have put petitioner to proof of this fact by specifically denying its existence. In view of respondents' denial, petitioner may not rest on mere allegation. He must prove the allegation. In *City of Kenosha v. Bruno, supra,* This Court said:

> "But although appellees in the Racine denials alleged jurisdiction pursuant to 28 U.S.C. Section 1331 as well as 1343, and in each complaint there was an allegation of an investment in a tavern of at least $20,000.00, the defendant municipal corporations answered by putting the appellees to their proof as to the amount in controversy. Since the cases were submitted and decided on cross-motions for summary judgment and stipulations of fact, and no stipulation as to the amount in controversy was filed, we cannot say on this state of record whether or not jurisdiction over the complaints was affirmatively established." *Id.* at 515.

As in *City of Kenosha, supra,* this case was submitted and decided by the District Court on cross-motions for summary judgment. Again, as in *City of Kenosha,* the Court"... cannot say on this state of record whether or not jurisdiction over the complaints was affirmatively established..." *Id.* at 515.

III. THE PETITIONER DID NOT HAVE SUCH AN INTEREST IN HIS EMPLOYMENT THAT HIS DISCHARGE AMOUNTED TO A DEPRIVATION OF LIBERTY OR PROPERTY.

A. *Petitioner's discharge from his public employment did not deprive him of a constitutionally protected property interest.*

Petitioner, Carl Bishop, employed by the City of Marion for two years and nine months, had passed from probationary status to permanent status after a period of six months continuous service. There was no written contract of employment nor any other specific agreement as to the term of his employment. He was discharged only after being notified on several occasions of deficiencies in his performance.

Petitioner does not contend that his discharge was other than in accord with provisions of the City's personnel ordinance. Rather, he contends that a belief on his part that his employment was secure had ripened into a constitutionally protected property interest when considered with the fact that no fellow officers had been fired during his employment, and that he had passed from probationary to permanent status. Without benefit of a contractural tenure provision, petitioner must necessarily rely on the theory of implied promise of con-

tinued employment to invoke pretermination procedural due process protection.

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, indeed, have a legitimate claim of entitlement to it." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 at 577 (1972).

Property interests are not granted or defined by the constitution but arise from other sources such as state law, mutually explicit understandings, express or implied contract, rules and regulations. *Board of Regents of State Colleges v. Roth, supra; Perry v. Sindermann*, 408 U.S. 593 (1972); *Arnett v. Kennedy*, 416 U.S. 134 (1974).

In *Arnett*, this court held that a federal civil service employee had a protected property interest in his job since, by statute, 5 U.S.C. Sec. 7501, he could be discharged only for cause.[4] On the other hand, no property interests are conferred "for example, where the applicable statutory or contractual terms, either expressly or by implication, did not provide for continued employment absent cause" *Id* at 167 n.2 (opinion of Powell, J.); Cf. *Board of Regents v. Roth, supra* at 578.

In determining whether any causes of removal are required, Justice White has reasoned" '... if there were, then the rule would apply that where causes of removal are specified by Constitution or Statute, as also where the term of office is for a

[4]The court went on to point out, however, that the employee's property interest was "conditioned and limited by the procedural limitations which had accompanied the grant of that interest." *Arnett* at 159.

fixed period, notice and hearing are essential. *If there were not, the appointing power could remove at pleasure or for such cause as it deemed sufficient.'* " (emphasis supplied) *Arnett v. Kennedy, supra* at 181 (separate opinion of White, J.) citing *Reagan v. United States*, 182 U.S. 419 (1901) and *Shurtleff v. United States*, U.S. 311 (1903). In accord with the above reasoning is the Court's decision in *Cafeteria and Restaurant Workers Union Local 473, AFL-CIO v. McElroy*, 367 U.S. 886 (1961), where it was pointed out that, absent legislation, government employment is terminable at the will of the of the appointing officer. *Id.* at 896.

Not only is there absent from the City of Marion's personnel ordinance any assurance of continued employment, but also absent are any specified causes for removal. The applicable portion of the ordinance states:

> "A permanent employee whose work is not satisfactory over a period of time shall be notified in what way his work is deficient and what he must do if his work is to be satisfactory. If a permanent employee fails to perform work up to the standard of classification held, or continues to be negligent, inefficient, or unfit to perform his duties, he may be dismissed by the City Manager. Any discharged employee shall be given a written notice of his discharge setting forth the effective date and reasons for his discharge if he shall request such a notice." (A. 6-7, 15).

Reasonably interpreted, the ordinance permits, but does not require, the continued employment of a policeman if his work is satisfactory. To interpret satisfactory performance as a catalyst giving rise to an expectancy of job retention protected by procedural due process guarantees is unfounded. Common

and universal understanding is that any employment contract is based on satisfactory performance. Although the ordinance is mandatory with respect to notifying employees of areas of deficient performance, it is merely permissive as to their dismissal for failure to adequately perform.

For obvious reasons, efficiency and discipline within a police department are of controlling importance. To pit a policeman discharged because of unsatisfactory performance against the supervisor who fired him in the adversary arena of an evidentiary hearing would serve only to hinder efficiency and make discipline more difficult to maintain. More importantly, it would likely do nothing to change the outcome. As Mr. Justice White stated in *Arnett, supra* at 185 (separate opinion of White, J.), "... if the termination were for reasons of pure efficiency, assuming such a general reason could be given... it would be at least arguable that a hearing would serve no useful purpose, and that judgments of this kind are best left to the discretion of administrative officials."

The City's personnel ordinance does no more than set forth a broad spectrum framework within which city employees are expected to work. The so-called "causes" for discharge which petitioner contends the ordinance contains are, if anything, simply guidelines by which performance may, but is not required to, be governed. The ordinance is not all inclusive, and it delineates no specific areas of misconduct mandating discharge. In sum, it provides for a standard of employee conduct which would be expected of any employee in any job, public or private - satisfactory work for the job held.

Petitioner's reliance on "permanent" status granted by the city's personnel ordinance to support his theory of an implied promise of continued employment is misplaced. Under North Carolina law, contracts of "permanent" employment, nothing else appearing, generally fall into the category of those terminable at the will of either party.[5] *Malener v. Jewelry Co.*, 223 N.C. 148, 25 S.E.2d 436 (1943). The rule is equally applicable to public employees. *Still v. Lance*, 279 N.C. 254, 182 S.E.2d 403 (1971). In *Lance*, a public school teacher sued for damages for the alleged wrongful termination of her employment contract. In discussing the contract, the Supreme Court of North Carolina concluded:

> "Upon its face, it contains no provision concerning the duration of the employment or the means by which it may be terminated. Nothing else appearing, such a contract of employment, even though it expressly refers to the employment as *'a regular, permanent job,'* is terminable at the will of either party." (emphasis supplied) *Lance*, 182 S.E.2d at 406.

B. *The Petitioner's discharge did not deprive him of a constitutionally protected liberty interest.*

The only reasons for discharge appearing in Petitioner's personnel file and, therefore, all that is available for inspection or review for job reference inquiries is that he was discharged for unsatisfactory work and failure to attend training schools.

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[5]However, the rule is otherwise and the result different if the word "permanent" is qualified, such as permanent employment for the term of at least 10 years. *Jones v. Light Co.*, 206 N.C. 862, 175 S.E. 167 (1934).

Hardly pernicious or unlikely to wrongfully injure Petitioner's reputation, these are not reasons for which a hearing is necessary to clear his name.

In support of his claimed liberty deprivation, Petitioner's brief (p. 33, 35) and the brief of *Amicus* (p. 11) seek to attach significance to the affidavit of Chief of Police Wood which was submitted to the Federal District Court in support of respondents' motion for summary judgment. The affidavit relates, in part, "Officer Bishop was relieved of his duties because of insubordination, failure to attend training classes, and acts unsuited to a police officer." (A. 32-34). The respondents do not disclaim responsibility for the affidavit, but point out that it was written and submitted to the court in response to the suit filed by Petitioner - quite sometime after his discharge.

Perhaps Petitioner could have used the affidavit properly in a trial where facts may be hotly contested, but this case was decided by the district court judge, as a matter of law, on cross motions for summary judgment. 377 F.Supp. 501 (1973). (Petition for certiorari, p. 12-24).

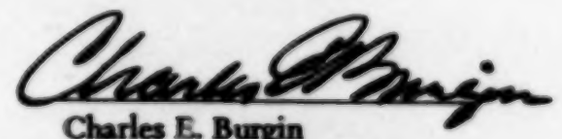
Future employment opportunities are not threatened here. The possibility of serious damage to Petitioner's reputation is simply not present. Allegations of dishonesty and immorality are not made. In short, no charges implicating a liberty interest are official reasons for Petitioner's discharge. All that is present in this case is the loss of a job and that, in itself, is not a deprivation of liberty. See *Arnett v. Kennedy*, 416 U.S. at 134 (opinion of Rehnquist, J.). In acknowledging that constitutional restraints exist upon governments

in their dealings with employees "is not to say that all such employees have a constitutional right to notice and hearing before they can be removed." *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, supra*, at, 896, 898.

CONCLUSION

For the reasons stated in Parts I and III of this brief, this Court should affirm the judgment of the Court of Appeals. Alternatively, for the reasons stated in Part II of this brief, the Court should remand the case to the District Court for the purpose of determining whether jurisdiction can be established pursuant to 28 U.S.C. Section 1331(a).

Respectfully submitted,



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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1303

CARL D. BISHOP, *Petitioner,*

v.

W. H. WOOD, *et al.*, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF AMICUS CURIAE FOR THE COALITION OF AMERICAN PUBLIC EMPLOYEES

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF AMICUS CURIAE FOR THE COALITION OF AMERICAN PUBLIC EMPLOYEES

INTEREST OF AMICUS[1]

The Coalition of American Public Employees ("Coalition") is an association of organizations, each of which endeavors to advance the interests of employees in their respective fields through collective bar-

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[1] The parties have consented to the filing of this brief and their letters of consent have been filed with the Clerk of the Court pursuant to Rule 42(2) of the Rules of this Court.

gaining and/or other means. The Coalition's constituent organizations and their memberships are as follows:

The *National Education Association ("NEA")* is the largest teacher organization in the United States, with a membership of approximately 1.7 million educators, most of whom are teachers in public educational institutions.

The *American Federation of State, County, and Municipal Employees ("AFSCME")*, AFL-CIO, has approximately 750,000 members who are employees of state and local governments.

The *National Treasury Employees Union ("NTEU")* represents approximately 95,000 non-supervisory employees of the United States Department of the Treasury.

The *American Nurses' Association ("ANA")* represents 205,000 members, many of whom are employees in state and local governmental institutions.

The *Physicians' National Housestaff Association ("PNHA")* has a membership of approximately 18,000 physician housestaff officers, predominantly interns and residents, many of whom are employees of state and local institutions.

The *National Association of Social Workers ("NASW")* represents 64,000 members, many of whom are employees at the state and local government levels.

In all, the Coalition represents approximately three million public employees who are members of the constituent organizations, and approximately two million other public employees who are non-members protected by collective bargaining agreements negotiated in their behalf.

The public employees represented by the Coalition and its constituent organizations have a direct interest in decisions of this Court which may determine and further define the extent to which procedural due process protects public employees who face discharge. In light of this interest, the Coalition submitted a brief amicus curiae in *Arnett* v. *Kennedy*, 416 U.S. 134 (1974), and does so here for the purpose of demonstrating that the summary discharge of petitioner, a police officer, abridged liberty and property interests protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

ARGUMENT

I. Introduction and Summary

In the case at bar petitioner, Carl A. Bishop, was discharged for cause from his employment as a police officer for the City of Marion, North Carolina. The city officials, as the district court found, did not afford Bishop a hearing or other rights of due process, though Bishop vigorously urged that the ostensible grounds relied on by the city officials in discharging him were contrary to fact. Whether Bishop was entitled to a full and fair determination of the truth or falsity of the allegations and charges relied upon by Marion officials turns upon the issues whether the city officials' action abridged a "liberty" or "property" interest protected by the due process clause. *Board of Regents* v. *Roth*, 408 U.S. 564 (1972); *Perry* v. *Sindermann*, 408 U.S. 593 (1972); *Arnett* v. *Kennedy*, 416 U.S. 134 (1974).

On the parties' cross motions for summary judgment, the district court concluded as a matter of law that Bishop did not possess a property interest and that

there had been no deprivation of his liberty. A panel of the court of appeals affirmed "on the opinion of the district court," and Circuit Judge Winter filed a dissenting opinion (Pet. App. 26).[2] Thereafter the court of appeals, sitting en banc, affirmed the district court's judgment by an evenly divided vote (*id.* at 30).[3]

We show below that the court of appeals erred in affirming the district court's order granting summary judgment for respondents, because Bishop was entitled to procedural due process on two grounds. First, Bishop held a legitimate claim of entitlement to continued employment absent cause. The Marion Personnel Ordinance conferred upon him the status of a permanent employee and set forth the causes for which such employees may be discharged. Second, respondents' action in summarily discharging Bishop for cause —*i.e.*, on grounds of "insubordination" and conduct "unsuited to a police officer"—constituted state action that could seriously stigmatize petitioner and could seriously interfere with his career prospects as a police officer. In short, respondents' action in summarily discharging Bishop for cause abridged "property" and "liberty" interests secured to Bishop by state law and the Fourteenth Amendment.

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[2] Citation is to the appendix attached to the petition for certiorari. This appendix contains all opinions and orders of the district court and the court of appeals. Other record materials are contained in the principal "Appendix" which is cited herein as "A" followed by the appropriate page reference.

[3] There are seven active or regular judges on the Fourth Circuit. Evidently the evenly divided vote of the court sitting en banc resulted from the fact that Senior Circuit Judge Bryan was a member of the original panel which heard this case and thus was eligible to sit as an eighth member of the court on rehearing en banc.

II. The Courts Below Erred in Concluding that Petitioner Does Not Possess a Legitimate Claim of Entitlement to Continued Employment Absent Sufficient Cause.

This Court has thrice concluded that, when a public employee possesses a "legitimate claim of entitlement to continued employment absent 'sufficient cause,'" he has a "property" interest which is subject to and protected by due process. *Perry* v. *Sindermann,* 408 U.S. 593, 602-03 (1972); *Board of Regents* v. *Roth,* 408 U.S. 564, 577-78 (1972); *Arnett* v. *Kennedy,* 416 U.S. 134, 166, 185, 208-09 (1974) (concurring and dissenting opinions respectively of Powell, White, and Marshall, JJ.). See also, *Goss* v. *Lopez,* 419 U.S. 565, 573 (1975). We show below that the Fourth Circuit erred in concluding that petitioner does not possess a legitimate claim of entitlement to continued employment absent sufficient cause.

First we discuss the reasons stated by the district court for its conclusion that Bishop does not have a property interest or claim of entitlement to continued employment. We necessarily focus on the district court's opinion for it is the only written explanation of the judgment below. The district court concluded that all procedures embodied in the ordinance creating Bishop's property interest had been complied with and thus Bishop had no property interest that is protected by the due process clause. We show that this analysis of "property" was rejected by six members of this Court in *Arnett, supra.*

Next, we show that Bishop possessed a legitimate claim of entitlement to continued employment, for he was, as the district court found, a nonprobationary employee. Pursuant to Article II of Marion's Personnel Ordinance, such employees are "permanent em-

ployees" who may be discharged, if at all, for the specific "causes" set forth in that ordinance. *Arnett* v. *Kennedy* and its antecedents make clear that such statutory provisions establish the requisite property interest for invoking the protections of procedural due process.

A. The District Court's Legal Analysis of Bishop's Property Interest Was Rejected by Six Members of This Court in Arnett.

The district court concluded that Bishop "had no tenure" or other property interest in continued employment (Pet. App. 22). In reaching this conclusion, the district court looked to two sources of state law that might create a property interest—the law of contracts and the Marion Personnel Ordinance. With respect to contract law, the district court held that "[u]nder the law in North Carolina, nothing else appearing, a contract of employment which contains no provision for the duration or termination of employment is terminable at the will of either party irrespective of the quality of performance by the other party" (Pet. App. 18). In this connection, the court found that "[t]here was no written contract of employment [between Bishop and respondents], nor was there any agreement as to the terms of such employment" (Pet. App. 13).[4]

The district court then turned to Article II, Section 6, of the Personnel Ordinance of the City of Marion, which provides:

> "*Dismissal.* A permanent employee whose work is not satisfactory over a period of time shall be notified in what way his work is deficient and what he must do if his work is to be satisfactory. If a permanent employee fails to perform work up to the standard of the classification held, or continues to be negligent, inefficient, or unfit to perform his duties, he may be dismissed by the City Manager. Any discharged employee shall be given written notice of his discharge setting forth the effective date and reasons for his discharge if he shall request such a notice" (Pet. App. 14).

[4] We do not discuss this point further since Bishop's clearest entitlement to continued employment arises from Marion's Personnel Ordinance.

The district court stated that the ordinance had been "complied with" and that it "does not require a notice or hearing," and ultimately concluded that "the city had not created by regulation or policy, any condition in which its employees could expect continued employment" (Pet. App. 19, 22).[5] Thus, as we understand it, the district court reasoned that Bishop's job security was limited to and defined by the minimal statutory procedures governing dismissals (written notice and a statement of reasons) and, as so limited, did not constitute a "property" interest protected by the due process clause.

Similar reasoning was advanced by three members of this Court in *Arnett* v. *Kennedy*, 416 U.S. 134, 155 (1974) (Opinion of Rehnquist, J.), and was rejected

[5] In support of its decision, the district court cited (Pet. App. 19-21) three cases decided before *Perry* v. *Sindermann* (*Still* v. *Lance*, 279 N.C. 254 (1971); *Hodgin* v. *Noland*, 435 F.2d 859 (4th Cir. 1970); and *Brown* v. *Hirst*, 443 F.2d 899 (4th Cir. 1971)), and two post-*Sindermann* cases presenting the issue whether non-tenured teachers were entitled to procedural due process when the employer allowed their contracts to expire without renewal (*Chitwood* v. *Feaster*, 468 F.2d 359 (4th Cir. 1972); and *Kota* v. *Little*, 473 F.2d 1 (4th Cir. 1973)). None of the plaintiffs in these cases were protected by a statute that creates a class of permanent employees and establishes the grounds for discharging such employees.

by a majority of the Court.[6] The statute before the Court in *Arnett*, the Lloyd-LaFollette Act, provided that certain classes of federal employees could be dismissed only for cause, established procedures for such dismissals, and expressly withheld, subject to agency discretion, the right to a hearing. 5 U.S.C. § 7501. The plurality opinion concluded that the Fifth Amendment's due process clause does not limit "Congress in the manner in which benefits may be extended to federal employees" (416 U.S. at 151) and that "the property interest which appellee had in his employment was itself conditioned by the procedural limitations which had accompanied the grant of that interest" (*id.* at 155).

Six Justices, however, rejected this analysis and concluded that the statutory procedures for discharge did not curtail or limit Kennedy's statutory entitlement to continued employment absent sufficient cause (*id.* at 166-67, 177, 210-11 (Opinions of Powell, J., joined by Blackmun, J.; White, J.; and Marshall, J., joined by Douglas and Brennan, JJ.)). As Mr. Justice White stated: "While the State may define what is and what is not property, once having defined those rights the Constitution defines due process, and as I understand it six members of the Court are in agreement on this fundamental proposition" (*id.* at 185; see also Marshall, J., at 211). Thus, the district court's reasoning, which was adopted by a majority of the

[6] *Arnett* was decided after the original panel of the Fourth Circuit heard oral argument but before it decided Bishop's appeal. Evidently the panel was unaware of *Arnett* for two members of the panel adopted the district court's opinion and Judge Winter's dissenting opinion makes no reference to *Arnett* (Pet. App. 25-29).

original panel of the court of appeals, is contrary to the conclusion of a majority of this Court in *Arnett*.[7]

B. The Ordinance Created for Nonprobationary Employees Like Bishop a Property Interest in Continued Employment.

While Marion's Personnel Ordinance did not establish procedures sufficient to satisfy the due process clause, it did, as we show below, define and establish a property interest in continued employment that is subject to and protected by the due process clause.

The Police Department of the City of Marion, as a matter of practice, places newly hired policemen on a six-month probationary period (A.19 24; Pet. App. 13). Bishop satisfactorily completed that probationary period and thereafter, as the district court found, he became a "permanent" employee of the City of Marion (Pet. App. 13).[8]

[7] In the wake of *Arnett*, the lower courts have routinely held that, in determining whether a public employee is entitled to due process, the employee's property right is not conditioned or limited by statutory procedures falling short of due process. *Oppenheimer Mendez* v. *Acevedo*, 388 F. Supp. 326, 334 (D. Puerto Rico, 1974), *aff'd*, 512 F.2d 1373 (1st Cir. 1975); *Eley* v. *Morris*, 390 F. Supp. 913, 920 (N.D. Ga., 1975); *Young* v. *Hutchins*, 383 F. Supp. 1167, 1178, n.15 (M.D. Fla., 1974); *Snead* v. *Department of Social Services*, 389 F. Supp. 935 (S.D. N.Y., 1974) (3-Judge Court), vacated and remanded for consideration of mootness, 421 U.S. 982 (1975).

[8] In our view, these findings of the district court, standing alone, are sufficient to establish a "property" interest, for when an institution as a matter of custom establishes a formalized probationary period, followed by employment as a "permanent" employee, reasonable men may fairly conclude that "probationary" means "on trial" and "permanent" means "permanent" and persons in the latter category have a legitimate claim of entitlement to continued employment absent cause. *Thomas* v. *Ward, et al.*, No. 74-1541 (4th Cir., Nov. 24, 1975) p. 6. See also *Perry* v. *Sindermann*, 408 U.S. at 602.

The "dismissal" of "permanent employees" of the City of Marion is governed by Article II, Section 6, of Marion's Personnel Ordinance (quoted at pp. 6-7, *supra*). That ordinance establishes four types of cause for which a "permanent" employee "may be dismissed by the City Manager":

(1) failure "to perform work up to the standard of the classification held,"

(2) continued negligence,

(3) continued inefficiency, or

(4) continued unfitness to perform his or her duties (see pp. 6-7, *supra*).

The ordinance's explicit enumeration of the causes for which a permanent employee may be discharged is dispositive of the "property" issue at bar. *Arnett* v. *Kennedy*, 416 U.S. at 134, 181, 209 (Opinions of Powell, J., joined by Blackmun, J.; White, J.; and Marshall, J., joined by Douglas and Brennan, JJ.).

The Marion ordinance not only establishes the "causes" for discharge but also reinforces the job security of "permanent" employees by further providing that if a "permanent employee's" work "is not satisfactory over a period of time" he shall be "notified of the way his work is deficient and what he must do if his work is to be satisfactory." The plain implication of this provision is that, even where the City has sufficient cause to dismiss a "permanent" employee, it will first give the employee fair warning of his shortcomings and an opportunity to conform with the standards required by the City.

In sum, the ordinance identifies the causes for which a permanent employee may be discharged, and further provides for fair warning and an opportunity to conform to standard before the discharge can be effectuated. Nothing in the ordinance suggests that "permanent" employees are subject to discharge at the pleasure of the employer or for no reason at all. Judge Winter concluded that "I can only read this ordinance as giving plaintiff a right to continuing employment unless there be good cause for his dismissal" (Pet. App. 27). Clearly then, the ordinance establishes for Bishop a "legitimate claim of entitlement to continued employment absent 'sufficient cause'" and the judgment below should be reversed.

III. The Court of Appeals, at a Minimum, Should Have Vacated the Judgment and Remanded the Liberty Issue for Determination in Light of Goss.

Respondents initially advised petitioner in writing that he was discharged because of unsatisfactory work and failure to attend training schools, but that statement did not fully reflect the nature and extent of the grounds relied upon by respondents for summarily terminating Bishop (A.6, 14). In support of respondents' motion for summary judgment, the Chief of Police of the City of Marion averred that "Officer Bishop was relieved of his duties because of insubordination, failure to attend training classes, and acts unsuited to a police officer" (A.33-34).

We show below that Bishop's constitutionally protected right to "liberty" was abridged without due process, for respondents' action in summarily dismissing Bishop for cause—*i.e.*, on grounds of "insubordination" and conduct "unsuited to a police officer"—constituted state action that "could seriously" stigmatize petitioner and "interfere" with his opportunities for other employment as a police officer. *Goss* v. *Lopez*, 419 U.S. 565, 574-75 (1975), interpreting and

applying *Board of Regents* v. *Roth, supra,* at 573; and *Wisconsin* v. *Constantineau,* 400 U.S. 433 (1971). In our view, the undisputed facts of record showing the alleged reasons for discharging Bishop establish as a matter of law that he is, or at least could be, seriously stigmatized by this state action and that his employment opportunities could be seriously interfered with. The court of appeals, sitting en banc, should have reversed the district court's judgment or, at a minimum, vacated that judgment with instructions to determine the liberty issue in light of this Court's then recent ruling in *Goss.*

A. The Standard

In *Roth,* this Court drew on a great body of procedural due process cases in arriving at its conclusions that "liberty" encompasses "the right of the individual . . . to engage in any of the common occupations of life . . ." (408 U.S. at 572), and that a discharge from public employment under circumstances which (1) "might seriously damage" an individual's "standing and associations in his community" or (2) "imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities" is a deprivation of liberty (*id.* at 573-74).[9]

[9] In *Roth,* the Court held that respondent, a professor whose one-year contract had been allowed to lapse, suffered no deprivation of liberty: "It stretches the concept too far to suggest a person is deprived of 'liberty' when he simply is not rehired in one job but remains as free as before to seek another." *Board of Regents* v. *Roth,* 408 U.S. at 575. The Court rejected the proposition that the non-retention of Roth in one job "taken alone, might make him somewhat less attractive to some other employers" and thus would establish a "foreclosure of opportunities amounting to a deprivation of 'liberty' " (*id.* at 574, n.13). The Court, however, assumed arguendo that a " ' substantial adverse effect' " on Roth's career interests would "constitute a state-imposed restriction on liberty . . ." (*id.*).

This Court applied *Roth's* principles in *Goss* v. *Lopez,* 419 U.S. 565 (1975). There, students who allegedly engaged in demonstrations and other disturbances during school were suspended for ten-day terms without notice or hearing. This Court concluded that the school administrator's actions impinged upon the students' property and liberty interests. In holding that the students' liberty interests were infringed, the Court said:

> "School authorities here suspended appellees from school for periods of up to 10 days based on charges of misconduct. If sustained and recorded, those charges *could seriously damage* the *students' standing* with their fellow pupils and their teachers *as well as interfere with later opportunities* for higher education and employment." (419 U.S. at 574-75; emphasis supplied).

As the Court's language in *Goss* makes clear, in determining whether a liberty interest is implicated, the courts should test the nature of the state-action (here the discharge) and the underlying grounds therefor against the *possibility* of serious damage to the individual's standing in his community and against the *possibility* of serious interference with later employment opportunities. Thus, in *Goss,* the Court concluded that the state action "*could* seriously damage" or "interfere" with the petitioner's standing and employment opportunities.[10]

[10] In *Arnett* v. *Kennedy,* 416 U.S. at 134, 157, Mr. Justice Rehnquist stated "that liberty is not offended by dismissal from employment itself, but instead by dismissal based upon an unsupported charge which *could* wrongfully injure the reputation of an employee" (emphasis supplied). See *Wellner* v. *Minnesota State Junior College Board,* 487 F.2d 153, 155 (8th Cir. 1973) (liberty standard is whether " 'government conduct likely will . . . impose

The subjunctive cast of the liberty standard is necessary because, at the time public officials are weighing whether they must offer a hearing, the impact of the officials' adverse action upon the individual has not yet resulted. Moreover, the full impact of stigmatization or employment foreclosure may not occur for some years after the public officials have taken their action or the court has decided the liberty issue. Finally, it is the likelihood, rather than the actuality, of injury that triggers due process, for the very purpose of a due process hearing is to *prevent* injury to an employee through unfair stigmatization. It would be inconsistent with this rationale to require the employee to actually suffer such injury before he can invoke the protections of the due process clause. Thus, the issue here, as in *Goss,* is whether reasonable men would conclude, at the time the discharge is implemented, that the city officials' determination to discharge Bishop on grounds of insubordination and conduct unbecoming a police officer "could seriously damage" his standing in the community or "could seriously . . . interfere" with "later opportunities for . . . employment" as a police officer.

B. Respondents' Summary Dismissal of Bishop on Grounds of Insubordination and Conduct Unsuited to a Police Officer Could Seriously Damage or Interfere with his Employment Prospects.

In light of *Goss,* it is clear that respondents' summary dismissal of Bishop did implicate the officer's

a stigma . . . that will foreclose future opportunities to practice his profession' "); *McNeill* v. *Butz,* 480 F.2d 314, 320, n.4 (4th Cir. 1973) (dismissal "might effectively foreclose a significant percentage" of job opportunities in community); *Christhilf* v. *Annapolis Emergency Hospital Association,* 495 F.2d 174, 178 (4th Cir. 1974) (denial of physician's hospital privileges "might effectively foreclose" his practicing in area).

"liberty" interest (Pet. App. 17-18).[11] Bishop was not suspended for ten days. He was fired. The utilization of that sanction against a permanent employee implies far more serious misconduct or failings than does the suspension of a student or an employee for a short period of time.[12] Furthermore, unlike Goss and his colleagues, Bishop cannot reasonably expect that prospective employers would excuse or minimize his alleged misconduct as acts of adolescent exuberance. On the contrary,

> "One must acknowledge what seems to be an accepted, if regrettable, fact of life: Removal from government employment for cause carries a stigma that is probably impossible to outlive. Agency personnel officers are generally prepared to concede, as employee spokesmen claim, that it is difficult for the fired [federal] government worker to find employment in the private sector." [13]

[11] *Goss* was decided nine days before the court of appeals, sitting en banc, affirmed the district court's judgment by an evenly divided vote of the court (Pet. App. 30).

[12] See Mr. Justice Powell's dissenting opinion in *Goss* v. *Lopez,* 419 U.S. at 589.

[13] Merrill, "Report in Support of Recommendation 72-8, Procedures for Adverse Actions Against Federal Employees," in 2 *Recommendations and Reports of the Administrative Conference of the United States,* 1007, 1015 (1972), quoted by Mr. Justice Marshall, dissenting in *Arnett* v. *Kennedy,* 416 U.S. 134, 213-14 (1974). The Report also appears, in slightly revised form, as Merrill, "Procedures for Adverse Actions Against Federal Employees," 59 *Va. L. Rev.* 198 (1973). See also Comment, "Due Process and Public Employment in Perspective: Arbitrary Dismissals of Non-Civil Service Employees," 19 *UCLA L. Rev.* 1052, 1065-66 (1972):

> "What must be recognized is that, under present conditions, a dismissal from public employment—regardless of its justification—is as potentially damaging to an individual's future employability as the affixing of a defamatory label. A dis-

Furthermore, the ostensible grounds relied upon by respondents in discharging Bishop are particularly serious in light of the requirements and responsibilities of his chosen profession. Commentators emphasize that internal discipline within a police force is necessary in order to control the authority exercised by and the discretion vested in the individual officer and to make the officer accountable to his superiors and to the public.[14] It is also widely recognized that an officer must have sound judgment and emotional stability.[15] Thus, given the requirements of the police profession, it is clear that discharge of an officer on grounds of "insubordination" could seriously interfere with his career opportunities in law enforcement. See, *Simmonds* v. *Government Employees' Service Commission*, 375 F. Supp. 934, 937-38 (D. V.I., 1974) (discharge for insubordination and continued failure to comply with regulations implicates liberty); *Morris* v. *Board of*

missal from public employment carries with it at least the intimation of incompetency or dishonesty. A dismissed public employee, therefore, may find the doors to reemployment especially hard to open. The employment applicant who is unable to respond positively to the inevitable question concerning past employment experience is seriously handicapped in his search for economic security."

[14] See, *e.g.*, American Bar Association Project on Standards for Criminal Justice, *Standards Relating to the Urban Police Function*, § 4.2 and Commentary, § 5.1 and Commentary (approved draft 1973) [hereinafter ABA Standards]; National Advisory Commission on Criminal Justice Standards and Goals, *Report on Police*, Standards 1.2 to 1.3 and Commentary (1973) [hereinafter Advisory Commission]; President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: The Police*, at 25-35 (1967) [hereinafter President's Commission].

[15] See, *e.g.*, ABA Standards, *supra*, note 14, § 7.3 and Commentary; Advisory Commission, *supra*, note 14, Standard 13.5 and Commentary; President's Commission, *supra*, note 14, at 125-26.

Education of Laurel School District, No. 4684 (D. Del., Aug. 4, 1975) p. 53 (nonrenewal for "persistent failure" to comply with administrative directives implicates liberty).

Moreover, Bishop's discharge was allegedly based not only on "insubordination," but also on conduct "unsuited to a police officer." This vague and amorphous charge (for which no particulars were given[16]) provides an especially invidious stigma that may seriously damage Bishop's efforts to secure future employment as a police officer, for such a charge is often used by public employers to signify immoral conduct or corrupt practices[17] which would automatically bar an individual from employment as a police officer.

The common law of defamation provides further confirmation that the ostensible grounds for Bishop's discharge could seriously interfere with his efforts to pursue his chosen career. As early as 1731, it was said that "[t]he law has always been very tender of

[16] In support of this ground for discharge, the Chief of Police averred that "a verbal complaint was filed against him [Bishop] by Sergeant Arrowood concerning Bishop's acts which were unsuited to a police officer" (A. 33).

[17] See *Coursey* v. *Greater Niles Publishing Co.*, 82 Ill. App. 2d 76, 227 N.E.2d 164 (1967), where a charge of conduct tending to bring police department into disrepute meant immoral advances by officer to teenage girl; and *Appeal of Baker*, 409 Pa. 143, 185 A.2d 521 (1962), and *Souder* v. *Philadelphia*, 305 Pa. 1, 156 A.245 (1931), where "conduct unbecoming an officer" meant involvement with criminal activities or figures. See also *Fisher* v. *Snyder*, 476 F.2d 375 (8th Cir. 1973), where public authorities used the label "conduct unbecoming a teacher" to mean that a 55 year old teacher had engaged in sexual relations with much younger men); and *Bence* v. *Breir*, 501 F.2d 1185 (7th Cir. 1974), where court held that the standard, conduct unbecoming a policeman, is void for vagueness.

the reputation of tradesmen, and therefore words spoken of them in the way of their trade will bear an action that will not be actionable in the case of another person." *Harman* v. *Delany*, 2 Strange 898, 93 Eng. Rep. 925 (1731). Statements that discredit a person in his chosen calling, including police work, are actionable per se either in libel or slander without proof of special damages. See, *e.g.*, *Commercial Tribune Publishing Co.* v. *Haines*, 228 Ky. 483, 15 S.W.2d 306 (1929) (libelous per se to accuse motorcycle policemen of neglecting duty by loitering and talking to women); *Holland* v. *Flick*, 212 Pa. 201, 61 A. 828 (1905) (libelous per se to charge detective with cowardice); *Scougale* v. *Sweet*, 214 Mich. 311, 82 N.W. 1061 (1900) (libelous per se to accuse sheriff of intentional neglect of duty); *Walsh* v. *Miami Herald Publishing Co.*, 80 So.2d 669 (Fla. 1955) (libelous per se to say that policeman in court gave testimony contradicting his own report of an accident). See generally *Annot.*, 53 A.L.R.2d 8 (1957). As Dean Prosser has explained, the reason that courts make such statements actionable without proof of special damages is that "[t]he likelihood of 'temporal' damage in such a case is sufficiently obvious . . . ." W. Prosser, *Law of Torts*, § 112 at 757 (4th ed. 1971).[18]

Finally, there is, at a minimum, a substantial likelihood that prospective employers will learn that Bishop was discharged on grounds of "insubordination" and

[18] The fact that those who defame police now may enjoy a qualified privilege arising under the First Amendment, *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964); *St. Amant* v. *Thompson*, 390 U.S. 727 (1968); *Time, Inc.* v. *Pape*, 401 U.S. 279 (1971), does not detract from the injury to the policeman's career interests, or make it less appropriate for the officer to have the opportunity to set the record straight in a due process hearing.

conduct "unsuited to a police officer." Generally, prudent employers inquire as to an applicant's prior work experience and reasons for terminating any prior employment relationships. In the field of law enforcement, it is standard practice for police departments to conduct background investigations of applicants for police work.[19] The President's Commission on Law Enforcement and Administration of Justice reported in its *Task Force Report: The Police*, p. 129 (1967), that a then recent study by the National League of Cities showed that "278 of the 284 cities surveyed reported that a background investigation was employed to investigate the character of police applicants."[20] More recently, the U.S. Department of Labor, Bureau of Labor Statistics, reported that "[b]ecause personal characteristics such as honesty, good judgment, and a sense of responsibility are especially important in police work, candidates are interviewed by a senior officer at police headquarters, and their character traits and background are investigated." U.S. Dept. of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 1974-75 Edition* (Bulletin 1785) p. 186. See also Circuit Judge Winter's dissenting opinion (Pet. App. 28).

[19] The background investigation of the applicant for police work is widely recognized as an important part of the selection process. ABA Standards, *supra*, note 14, § 7.3, Commentary, at 199-200; Advisory Commission, *supra*, note 14, Standard 13.5, Commentary, at 339-40; President's Commission, *supra*, note 14, at 129.

[20] Compare *Goss* v. *Lopez*, 419 U.S. at 575 n.7, where the Court noted that "Appellees assert in their brief that four of 12 randomly selected Ohio colleges specifically inquire of the high school of every applicant for admission whether the applicant has ever been suspended. . . . Appellees also contend that many employers request similar information."

The short of the matter is that, in discharging Bishop for "insubordination" and conduct "unsuited to a police officer," respondents have taken measures that could seriously interfere with Bishop's career as a police officer and his prospects for future employment.

C. The Court of Appeals Should Have Vacated the District Court Judgment for Consideration in Light of Goss.

The district court stated that "[h]ere, as in *Roth*, there is no suggestion whatever that the plaintiff's loss of his 'good name, reputation, honor or integrity' is at stake. There is nothing involved except one job with the city, and the plaintiff remains free to seek another job" (Pet. App. 17). Thus, the court concluded that Bishop's "dismissal did not result in deprivation of his liberty in any form" (*id.* at 22), and the court of appeals affirmed. In our view, it is unclear whether the district court's statements are intended to mean that Bishop had not adequately raised a "liberty" issue or are meant to be a ruling against Bishop on the merits of his liberty interest.[21]

Judge Winter, dissenting, concluded that *Roth* and *Sindermann* "not only foreclosed the entry of summary judgment for defendants, but require that, if summary disposition is to be made, plaintiff should be adjudged entitled" to summary judgment (Pet. App. 26). As he pointed out, petitioner was dismissed, *inter alia*, for "insubordination" and "conduct unsuited to a police officer" and "[a]ccusations of this nature made against one engaged in the occupation of a law enforcement officer manifestly have a severe adverse impact

[21] While the motions and affidavits of the parties do not mention the impact of petitioner's discharge on his good name or career interests, petitioner's complaint and motion for summary judgment are broad enough to raise the liberty issue (A. 8, 36-37).

upon future employment opportunities, and it can be reasonably expected that defendants would disclose these reasons upon the request of a person considering plaintiff's employment who inquired of the respects in which plaintiff's work had been found unsatisfactory" (Pet. App. 28).

This Court's decision in *Goss* fully supports Judge Winter's conclusions (see pp. 13-15, *supra*). Accordingly, if this Court reaches the liberty issue, it should vacate the judgment below with instructions that the liberty issue be decided in light of *Goss*.

CONCLUSION

For the reasons stated in Part II of this brief, this Court should reverse the judgment of the court of appeals and order that summary judgment be entered for plaintiff. If, however, the Court decides the property issue adverse to petitioner, then the Court should vacate the judgment below and remand the liberty issue for consideration in light of *Goss*.

Respectfully submitted,

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PETITIONER'S REPLY BRIEF

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 74-1303

CARL D. BISHOP,

Petitioner,

v.

W. H. WOOD, CHIEF OF POLICE OF THE CITY OF MARION, NORTH CAROLINA; VICTOR DENTON, CITY MANAGER OF THE CITY OF MARION, NORTH CAROLINA; and THE CITY OF MARION, NORTH CAROLINA, A MUNICIPAL CORPORATION,

Respondents.

****

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

****

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PETITIONER'S REPLY BRIEF

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 1303

CARL D. BISHOP,

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W. H. WOOD, CHIEF OF POLICE OF THE CITY OF MARION, NORTH CAROLINA; VICTOR DENTON, CITY MANAGER OF THE CITY OF MARION, NORTH CAROLINA; and THE CITY OF MARION, NORTH CAROLINA, A MUNICIPAL CORPORATION,

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ARGUMENT

I. THE DISTRICT COURT HAD JURISDICTION OF THIS CASE UNDER 28 U.S.C. 1343 and 42 U.S.C. 1983.

Respondents incorrectly argue that the district court was without jurisdiction under 28 U.S.C. 1343 and 42 U.S.C. 1983. Apparently those sections provide no jurisdictional basis for a claim against defendant City of Marion. City of Kenosha v. Bruno, 412 U.S. 507 (1973). But clearly these statutes constitute a proper jurisdictional basis for claims against defendants W. H. Wood, Chief of Police, and Victor Denton, City Manager.

Respondents argue that because the words "and individually" were not inserted in the complaint following the official designations of defendants Wood and Denton (A. 3-4), there was no subject matter jurisdiction. (Respondents' Brief, pp. 4-5). This argument is unsound for three reasons.

First, the executive officers of state and local governmental units have no absolute immunity from damage claims, even when sued in their official capacities. At most they have a qualified immunity. Scheur v. Rhodes, 416 U.S. 232 (1974); Wood v. Strickland, ___ U.S. ___, 43 L.ed.2d 214 (1975).

Second, petitioner has sought injunctive relief against respondents, consisting of reinstatement. (A. 9). A suit for injunctive relief against an officer is properly lodged against him in his official capacity. When an officer acts in an unconstitutional manner, his actions are stripped of their official cloak, and he may be ordered to perform duties in consonance with the Constitution. Ex parte Young, 209 U.S. 123, 159 (1908);

Griffin v. County School Board, 377 U.S. 218, 228 (1964). In fact it is only in their official capacities that respondents have the power to reinstate petitioner as a policeman. O'Brien v. Galloway, 362 F.Supp. 901 (D.Del. 1973) (policeman discharge case).

Third, the failure to include the words "and individually" in the caption and introductory paragraphs of the complaint, cannot be deemed under the Federal Rules of Civil Procedure to constitute a fatal jurisdictional defect. Technical forms of pleadings are not required, and all pleadings shall be construed to do substantial justice. Rule 8(e)(1), (f). Under Rule 10(a) where the real defendant is identifiable from the

record, or it appears that the real defendant has actually been personally served, a misnomer as to name or capacity is of no consequence. Nicol v. Baird, 234 F.2d 691 (D.C.Cir. 1956); Miller v. Director of Middletown State Hospital, 146 F.Supp. 674 (S.D.N.Y. 1956), aff'd., 243 F.2d 527 (2d Cir. 1956).

Contrary to respondents' contention (Respondents' Brief, p. 4), it is alleged that the Chief of Police and the City Manager violated the applicable city ordinance. However, even if the conduct of these officers was perfectly in accord with local law, they would remain liable for violation of petitioner's constitutional rights under 42 U.S.C. 1983. It has

always been understood that state action giving rise to liability under this statute includes action taken by state officials pursuant to state law, as well as in violation of it. Monroe v. Pape, 365 U.S. 167, 184 (1961).

As an alternative jurisdictional basis, petitioner has invoked 28 U.S.C. 1331. Petitioner is in agreement with respondents' statement that jurisdiction under 28 U.S.C. 1331 cannot be determined on the present record, and it would be necessary for the district court on remand to determine whether jurisdiction can be founded on this section. (Respondents' Brief, pp. 6-7).

II. PETITIONER CONSISTENTLY AND CORRECTLY HAS MAINTAINED THAT HE WAS DISCHARGED IN VIOLATION OF THE MUNICIPAL PERSONNEL ORDINANCE.

Respondents state, "Petitioner does

not contend that his discharge was other than in accord with the provisions of the City's personnel ordinance. (Respondents' Brief, p. 7). In his opening brief (pp. 38-39) petitioner made it clear that he did not regard his discharge to have been in conformity with the Marion Personnel Ordinance. Petitioner's position is that he was not notified of any deficiencies in his work nor told what he must do to render it satisfactory, that he did not continue to be and never was a substandard performer, negligent, inefficient or unfit, and that he was never given a written notice setting forth reasons for the discharge, all in contravention to the personnel ordinance.

Respondents argue that the ordinance permits, but does not require, the continued employment of one whose work is

satisfactory. Yet respondents concede that "the ordinance is mandatory with respect to notifying employees of areas of deficient performance, . . ." (Respondents' Brief, pp. 9-10). Since for purposes of summary judgment petitioner has shown that he was not notified that his work was deficient in any way prior to discharge, an admittedly essential procedure was violated, and petitioner is entitled to relief for that reason alone. Arnett v. Kennedy, 416 U.S. 134 (1974).

To pursue respondents' construction of the ordinance to a logical conclusion, an absurd result is obtained: A "permanent" employee whose service is diligent, productive and in all respects satisfactory may be discharged at any time without warning or cause; while the "negligent inefficient or unfit" worker must be given

notice of his shortcomings and an opportunity to conform to standards, and then can be discharged only for continued deficiency. The only intelligible reading of this ordinance is to accord all permanent employees job security, and to allow for dismissal only of those with deficient performance, and then only after warning, after opportunity for reform, and with good cause.

For reasons set forth in petitioner's opening brief (pp. 20-23), the personnel ordinance gave rise to a constitutionally protected property interest of objective expectancy of continued employment, because of its terminology "permanent employee", the enumeration of causes for

dismissal, and the requirement of warning and opportunity for reform.

Respectfully submitted,

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